A REPORT TO THE ACTING GOVERNOR AND THE CHIEF JUDGE

RECOMMENDATIONS ARISING FROM THE 1976 MARYLAND CONFERENCE ON JUDICIAL NOMINATING COMMISSIONS

October 1977

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RECOMMENDATIONS ARISING FROM THE 1976 MARYLAND CONFERENCE ON JUDICIAL NOMINATING COMMISSIONS

A Report to the Acting Governor and the Chief Judge of the Court of Appeals from the State Court Administrator

October, 1977

Background.

On December 16, 1976, the Hon. Alan M. Wilner, then the Governor's Chief Legislative Officer, convened the Maryland Conference on Judicial Nominating Commissions.

The Conference took place approximately two years after Governor Mandel's 1974 Executive Order restructuring the commissions, and some six and one-half years after the initial creation of the commissions in 1970. The purpose of the Conference was to review the experiences of the commissions over these periods of time, and to recommend to both of you any improvements in structure or procedure that might make the commissions more effective.

Participating in this effort were 38 conferees, both lawyers and lay people, representing eight of the nine nominating commissions, the judiciary, both Houses of the General Assembly, the Maryland State, Women's, and Federal Bar Associations, 14 County Bar Associations, the League of Women Voters, and the American Judicature Society. The conferees had prepared for their task by review of a 60 page study of "The Judicial Nominating Commission Process in Maryland - Background, Development, and Considerations for Change."[1/]

1/ Copy attached, as Appendix I.

As Secretary of the Conference, as well as of the several nominating commissions, it is my function to transmit to you the recommendations made by the Conference, as well as certain other suggestions based upon Conference comments or observations of commission activities.

Recommendations.

At the outset, I am pleased to note that the Conference was supportive of the nominating commission concept. It favored retention of the commissions. The proposals it made were all designed to strengthen and improve the working of the commissions.

A. Commission Structure and Composition.

Under the Executive Order of October 4, 1977, as under the Executive Order of December 18, 1974,[2/] each of the nine nominating commissions consists of six lawyers elected by members of the Bar; six lay persons appointed by the Governor, and a Chairman appointed by the Governor. The State Court Administrator is Secretary to each commission. The Administrative Office of the Courts provides staff support for all of them.

1. Each Commission Should have a Vice-chairman (Paragraphs 16 and 17)[3/]

Although some conferees thought that the commission chairman should be selected by some process other than gubernatorial appointment, the majority favored retention of the gubernatorial appointment system.

However, it was noted that some chairmanships had remained vacant for extended periods, thus making it difficult for commissions to function. Illness

2/ An Executive Order of December 14, 1974, established the commissions in their present form. It was that Executive Order that was before the 1976 Conference. The Acting Governor amended the 1974 Executive Order by an Executive Order dated October 4, 1977. The 1977 Order in most respects restated the 1974 Order, so reference in this paper will be chiefly to the 1977 Order, except when it is important to note provisions of the 1974 order. The 1977 Order is attached as Appendix II. The 1974 Order may be found in Appendix A of Appendix I.

3/ The paragraph references are to the "Summary of Proceedings of the Maryland Conference on Judicial Nominating Commissions," attached as Appendix III.

or absence of a chairman could also cause problems. Therefore, the Conference recommended that each commission have a vice-chairman, to be elected by vote of a majority of the full authorized membership of the commission, and to have authority to perform all of the duties of the chairman in the latter's absence.

This recommendation could be accomplished by amending the Executive Order as follows:[4/]

> In each of paragraphs 3(a) and 4(a), renumber subparagraph (4) as (5) and insert a new subparagraph (4), to read:
>
> (4) [THE][5/] [EACH][6/] COMMISSION SHALL ELECT A VICE-CHAIRMAN FROM AMONG ITS MEMBERS BY VOTE OF A MAJORITY OF ITS FULL AUTHORIZED MEMBERSHIP. THE VICE-CHAIRMAN MAY PERFORM ANY OF THE DUTIES OF THE CHAIRMAN DURING THE LATTER'S ABSENCE, UNAVAILABILITY, OR INABILITY TO ACT.

2. Commission Composition Should not be Changed. (Paragraphs 18 and 19).

The Conference agreed that the basic commission composition (one chairperson, six lay members, six lawyers) should remain unchanged nor was any real dissatisfaction expressed with the notion of gubernatorial appointment of the chairperson and the lay members and the election of lawyer members. However some months after adjournment of the Conference, a question was raised about apportionment of membership in a multi-county circuit in which one of the counties is substantially larger than the others. Specifically, the issue was raised with respect to the Seventh Circuit Commission, which includes Prince George's, Calvert, Charles, and St. Mary's Counties. The lawyer population in Prince George's County probably now exceeds 700, and thus is over seven times the

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4/ Several of the recommendations involve amendments to the same portions of the Executive Order, the Court of Appeals Selection Regulations, or other documents. In drafting each proposed amendment, no account has been taken of any other proposed amendment involving that same portion. This is intended to enhance clear understanding of each proposed amendment and to facilitate the acceptance or rejection of each recommendation on the basis of its own merits or demerits. However, attached to the Table of Contents and Summary preceding the full text of the Report are drafts of the 1977 Executive Order and other pertinent documents, incorporating all proposed amendments.

5/ Paragraph 3(a) (4) (Appellate Commission)
6/ Paragraph 4(a) (4) (Trial Courts Commission)

combined lawyer population of the other three counties in that circuit. Yet, there are only five commission members from Prince George's County: the appointed chairman (a lawyer), two elected lawyer members, and two lay members. Thus, the Prince George's County members constitute less than a majority of the full authorized membership of the commission. This is an important factor because an individual may be nominated only by vote of at least a majority of the full authorized membership.

At present, this appears to be a situation unique to the Seventh Circuit. In the Third Circuit, consisting of Baltimore and Harford Counties, there are eleven members from Baltimore County. In the Fifth Circuit, consisting of Anne Arundel, Carroll, and Howard Counties, there are eight members from Anne Arundel County. In the Sixth Circuit, consisting of Montgomery and Frederick Counties, there are eleven members from Montgomery County. In none of the remaining circuits do we find such substantial disparity between the lawyer population in the largest county in the circuit and the combined lawyer population of the other counties.

Several solutions have been suggested as means of changing this situation. One of them is that commissions should be organized on something less than a circuit basis, perhaps following the district organization of the District Court. This approach would put Prince George's County by itself, with its own commission. The same would be true of other large counties, such as Anne Arundel, Baltimore, and Montgomery. However, this approach would produce a large number of commissions, adding to expense and staffing problems, and it is also thought that there is much to be said for the circuit approach to commission organization. Judges are quite mobile within most of the circuits, as are lawyers, and the views of both lawyers and lay people from throughout a circuit are helpful in judicial selection.

Actually, if a problem exists in the Seventh Circuit, it seems that it could be corrected by the appointive and elective processes. With respect to

lay members, Paragraph 4(a)(2) of the Executive Order requires that in a circuit containing more than one county, at least one lay member must be appointed from each county. That means that three lay persons could be appointed from Prince George's County, instead of the present two, with the other three lay members coming from the other three counties in the circuit.

As to the lawyer members, under the Court of Appeals "Appellate and Trial Court Judicial Selection Regulations" of January 6, 1975,[7/] the elections of lawyer members are conducted on a circuit basis. Paragraphs 13 and 14 of those regulations in effect provice that there should be at least one lawyer member from each county in the circuit. Thus, in the Seventh Circuit, there could be three lawyer members from Prince George's County (instead of the present two) with the other three lawyer members distributed among the other three counties. Because of the large size of the Prince George's County Bar, this is a matter largely within the control of that Bar.

Therefore, it is apparent that it would be quite possible for there to be six Prince George's County commission members on the Seventh Circuit Commission, and if the chairperson should also be from Prince George's County, there could be seven, or a majority of the full authorized membership of the commission.

Therefore, except to the limited extent suggested in Paragraph 4 below, it is not recommended that any change be made in the provisions relating to apportionment of commission members among the several counties of a multi-county circuit.

Recent commission lists have caused some to question the racial makeup of the commissions. Questions might also be raised about sexual, ethnic, political, geographical or other aspects of commission membership. Because of the diverse demography of the several circuits, it is probably not practicable to prescribe State-wide racial, sexual, or ethnic quotas or goals for commission membership.

7/ Appendix B of Appendix I

So far as the elected lawyer members are concerned, membership depends in the first instance on which lawyers are prepared to run for election to the commission, and in the second, on appointment by the Court of Appeals, if candidates for election do not present themselves.

There is no doubt in my mind that in a number of the circuits, the racial composition of the commissions could be improved. I reach the same conclusion as to women. But I think that these issues must be addressed by the appointing authorities and by minority and women members of the Bar, initially rather than by changes in the Executive Order.

3. The Basic Eligibility Requirement for Lawyer Members of Trial Courts Commissions Should be Maintenance of a Principal Office in the Circuit (Paragraph 2).

No problem seems to exist about the apportionment of membership on the Appellate Nominating Commission. Paragraph 3(a), subparagraphs (1) and (3) require, in effect, the appointment of a lay member and the election of a lawyer member from each of the six Appellate Judicial Circuits. This produces a reasonable geographical spread.

But on the Trial Courts Commissions, the picture is a bit different. Here, the Executive Order (Paragraph (4)(a)(2)) calls for six lay persons appointed by the Governor. In addition, it is required that there be six lawyer members, "who reside and are registered voters in the Circuit" (Paragraph 4(a)(3) of the Executive Order).

With respect to the lawyer members, a problem arises in some areas because a lawyer may reside in one circuit but maintain his principal office in another. For example, there are many lawyers who maintain their offices in Baltimore City (the Eighth Circuit) but who reside in Baltimore County (the Third Circuit). While these lawyers may be at least socially familiar with those who reside and practice in Baltimore County, and thus who would be likely candidates for judgeships there, their professional contacts may be more extensive with other lawyers who practice primarily in Baltimore City. Yet the Executive Order prohibits them from serving on the Baltimore City Commission.

It was prpopsed to the Conference that the geographic eligibility requirements be changed to require that a lawyer member both reside and maintain his principal office for the practice of law in the circuit in which he sought commission membership. That proposal was rejected, and instead the Conference adopted a recommendation that maintenance of a principal office within the circuit be the basic geographic eligibility requirement for lawyers. Since it seems desirable to maintain the requirement that lawyer members be registered voters, thus demonstrating at least a certain minimal interest in public affiars, this recommendation could be achieved by the following amendment to Paragraph 4 of the Executive Order:

> 4. a. (3) Six persons shall be members of the Maryland Bar who [reside and are registered voters in the Circuit] ARE REGISTERED TO VOTE IN STATE ELECTIONS AND WHO MAINTAIN THEIR PRINCIPAL OFFICES FOR THE PRACTICE OF LAW IN THE CIRCUIT. They shall be elected by the members of the Maryland Bar who [reside and are registered voters in the Circuit] ARE REGISTERED TO VOTE IN STATE ELECTIONS AND WHO MAINTAIN THEIR PRINCIPAL OFFICES FOR THE PRACTICE OF LAW IN THE CIRCUIT.

Paragraphs 8, 9, and 11 of the Court of Appeals Judicial Selection Regulations should also be amended to conform to this change. These amendments would be as follows:

> 8. In each multi-county Judicial Circuit there shall be at least one member of the Judicial Commission for that Circuit [from] WHO MAINTAINS HIS PRINCIPAL OFFICE FOR THE PRACTICE OF LAW IN each county from which there is a nominee. Such members are hereinafter called "county members."
>
> 9. Any lawyer who [both resides and] IS REGISTERED TO VOTE IN STATE ELECTIONS AND WHO maintains his principal office in this State is eligible to vote for all the members of the Trial Court Commission to be elected from the Judicial Circuit in which he maintains his principal office.
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> 11. Nomination for election as a member of a Trial Court Commission shall be by written petition filed with the Administrative Office. Each petition shall state the name of the nominee and the Judicial Circuit from which he seeks election. The nominee shall verify in the petition his status as a lawyer, HIS STATUS AS A REGISTERED VOTER, [his home and] HIS principal office [addresses] ADDRESS, and his intent to serve if elected. [Remainder of Paragraph 11 to remain unchanged].

It should be noted that the present Court of Appeals Judicial Selection Regulations define "principal office".

4. <u>The Selection Regulations Should be Amended to Provide for Better Lawyer Apportionment. (Paragraph 20).</u>

Paragraph 16 of the Court of Appeals Selection Regulations provides for the filling of a vacated position in the lawyer membership of a commission. That is accomplished by vote of the remaining lawyer members, and there is no apportionment problem, since the person selected must "maintain his principal office in the county in which his predecessor maintained his principal office."

However, under Paragraph 18 of those Regulations, in any case in which there is no valid nomination of a lawyer member pursuant to the original election process, the Court of Appeals apparently has unrestricted authority to appoint someone to fill that position, subject to the requirement that the appointee maintain his principal office within the circuit. This could mean that a county within a circuit might be without lawyer representation.

The same result can occur under the voting provisions of Paragraph 13, if there happen to be at least six lawyer-nominees from only one county in a circuit.

The Sixth Circuit elections in 1975 afford an example of what can happen under these provisions. Seven lawyers from Montgomery County were nominated. There were no nominees from Frederick County. As a consequence, six of the Montgomery County candidates were elected, thereby filling the lawyer membership of the commission and excluding therefrom any lawyer member from Frederick County.

In a number of other jurisdictions, there were no lawyer nominees and the Court was required to appoint the lawyer members. It could have exercised this power of appointment to the exclusion of some county within the circuit.

I recognize that there may be some counties in which there are no lawyers who wish to serve on a commission. This could occur in a small county with only a handful of lawyers, some of whom might be ineligible because of holding some public office, and others of whom might not wish to serve on the commission because they themselves might have judicial ambitions. But where possible, it seems desirable to assure that there be at least one lawyer member from each county in the circuit.

Thus, amendments should be made to the Court of Appeals Selection Regulations to assure two things:

1. That a large county cannot sweep all the lawyer memberships (as was the case in the Sixth Circuit) simply because there is no lawyer nominee from one or more of the other counties in the circuit; and

2. To require the maximum feasible amount of apportionment when the Court of Appeals makes an initial appointment when there has been no election.

These objectives could be attained by the following amendments to the Selection Regulations:

Amend the second sentence of Paragraph 13 of the Selection Regulations to read:

> Each voter in any other circuit, as a condition of the validity of his ballot, shall cast that number of votes as the number of members remaining to be elected after the close of nominations, REDUCED BY ONE FOR EACH COUNTY IN THE CIRCUIT AS TO WHICH THERE IS NO NOMINEE.

Amend Paragraph 18 of the Regulations by adding the following sentence:

> IN MAKING APPOINTMENTS UNDER THIS PARAGRAPH, THE COURT OF APPEALS SHALL ASSURE THAT EACH TRIAL COURT COMMISSION INCLUDES AT LEAST ONE LAWYER MEMBER FROM EACH COUNTY IN THE CIRCUIT, IF EACH COUNTY IN THE CIRCUIT INCLUDES AT LEAST ONE LAWYER WHO IS QUALIFIED FOR SERVICE ON THE COMMISSION AND WILLING TO ACCEPT THE APPOINTMENT.

These proposals are consistent with recommendations made by the Conference.

5. Commission Members Should be Prohibited From Holding an Office of Profit or Trust Under the Constitution or Laws of the State; From Being Full-time State Employees; and from Holding an Office in a Political Party. (Paragraph 21).

Provisions of the present Executive Order and of the Court of Appeals Selection Regulations are not uniform with respect to disqualification from commission membership because of the holding of some other position.

Paragraph 3(a)(1) of the Executive Order provides that the Chairman of the Appellate Commission "may not be an elected State official or a full-time employee of the State."

Paragraph 3(a)(2) includes a similar prohibition with respect to lay members of the Appellate Commission.

Paragraph 4(a)(1) does not include any such prohibition with respect to the chairmen of the Trial Courts Commissions, but does include, in sub-paragraph (2), a similar prohibition with respect to lay members.

The Executive Order does not include any such disqualification provisions for lawyers. However, Paragraph 10 of the Court of Appeals Selection Regulations provides that a person is eligible for election to lawyer membership if he "is not an elected governmental official or full-time Federal, State, or municipal official or employee...."

Thus, there seems to be a gap as to the chairmanships of the Trial Courts Commissions and a disparity as between the provisions applying to lay members and lawyer members.

The Conference found this a difficult issue. Although the 1975 questionnaires completed by commission members showed a strong concensus (60 to 5) in favor of uniform prohibitions for both lay and lawyer members, and in favor of prohibiting commission service by elected State officials, full-time State employees, elected government officials, full-time Federal employees, full-time county employees, and full-time municipal employees, debate at the Conference apparently produced some change of attitude.

Initially, the conferees agreed that all elected public officials at any governmental level should be excluded. They also agreed that all full-time government employees should be excluded. But further discussion produced a motion for deferral of the entire issue of disqualification to some future date. That motion was carried.

The problems are several. On the one hand, there was a desire to exclude public officials who might be perceived as receptive to influence from the

Governor because of political factors. In addition, there was some concern that highly-placed public officers might exert undue pressures on other commission members. Some also felt that full-time public employees could be perceived as subject to influence by political officials.

On the other hand, there was a concern that unduly broad restrictions would unreasonably narrow the potential membership of the commissions.

The only clear consensus emerging from the Conference was that there should be some restrictions and that they should be uniform as to both lay and lawyer members.

An examination of the relevant provisions used by other states indicates that the two most general prohibitions relate to the holding of public office (whatever that may mean) and the holding of office in a political party.

It is suggested that these provisions be adapted for use in Maryland. As to the public office issue, I propose that the term "office of profit or trust under the Constitution or laws of the State" be used since that phrase has a relatively well-understood meaning in Maryland and probably encompasses the holders of most major political offices. I suggest that the prohibition against full-time State employees be continued, but that there be no prohibition against county and municipal employees, since descending to these levels might well be counter-productive. Finally, I would propose adding a prohibition with respect to those who hold office in a political party.

Obviously, these approaches do not constitute a perfect response to concerns about conflicts of interest or political influence, but I suggest they are a reasonable compromise.

I further suggest that all such provisions be included in the Executive Order itself, rather than those pertaining to lawyer members being relegated to the Court of Appeals Selection Regulations.

These recommendations could be accomplished by the following amendments:

Amend Paragraph 3 of the Executive Order to read as follows:

3.

(a) The Appellate Judicial Nominating Commission is created as part of the Executive Department. It consists of 13 persons and a non-voting Secretary, chosen as follows:

(1) One person, who shall be the Chairman, shall be appointed by the Governor. The Chairman may but need not be a lawyer, and shall be selected from the State at large. [He may not be an elected State official or a full-time employee of the State.] HE MAY NOT HOLD AN OFFICE OF PROFIT OR TRUST UNDER THE CONSTITUTION OR LAWS OF THIS STATE, AN OFFICE IN A POLITICAL PARTY, OR BE A FULL-TIME EMPLOYEE OF THE STATE.

(2) One person shall be appointed by the Governor from each of the Appellate Judicial Circuits, and shall be a resident and registered voter in the circuit from which he is appointed. These persons may not be lawyers, [elected State officials, or full-time employees of the State] HOLD AN OFFICE OF PROFIT OR TRUST UNDER THE CONSTITUTION OR LAWS OF THIS STATE, AN OFFICE IN A POLITICAL PARTY, OR BE FULL-TIME EMPLOYEES OF THE STATE.

(3) One person, who shall be a member of the Maryland Bar, shall be elected by the members of the Maryland Bar in each of the six Appellate Judicial Circuits. THESE PERSONS MAY NOT HOLD AN OFFICE OF PROFIT OR TRUST UNDER THE CONSTITUTION OR LAWS OF THIS STATE, AN OFFICE IN A POLITICAL PARTY, OR BE FULL-TIME EMPLOYEES OF THE STATE. The elections in each circuit shall be conducted by the State Court Administrator pursuant to rules promulgated by the Court of Appeals.

(4) The State Court Administrator is ex-officio, the non-voting Secretary of the Commission.

Amend Paragraph 4 of the Executive Order to read as follows:

4.

(a) Creation and Composition.

A Trial Court Judicial Nominating Commission is created as part of the Executive Department for each of the eight judicial circuits of the State. They each consist of 13 persons, and a non-voting Secretary, chosen as follows:

(1) One person, who shall be the Chairman, shall be appointed by the Governor. The Chairman may but need not be a lawyer, but shall be a resident and registered voter of the Judicial Circuit. HE MAY NOT HOLD AN OFFICE OF PROFIT OR TRUST UNDER THE CONSTITUTION OR LAWS OF THIS STATE, AN OFFICE IN A POLITICAL PARTY, OR BE A FULL-TIME EMPLOYEE OF THE STATE.

(2) Six persons shall be appointed by the Governor from among the residents and registered voters of the Judicial Circuit. These persons may not be lawyers, [elected State officials, or full-time employees of the State] HOLD AN OFFICE OF PROFIT OR TRUST UNDER THE CONSTITUTION OR LAWS OF THIS STATE, AN OFFICE IN A POLITICAL PARTY, OR BE FULL-TIME EMPLOYEES OF THE STATE. If the Judicial Circuit contains more than one county, at least one person shall be appointed from each county in the Circuit, and shall be a resident and registered voter of such county.

(3) Six persons shall be members of the Maryland Bar who reside and are registered voters in the Circuit. THESE PERSONS MAY NOT HOLD AN OFFICE OF PROFIT OR TRUST UNDER THE CONSTITUTION OR LAWS OF THIS STATE, AN OFFICE IN A POLITICAL PARTY, OR BE FULL-TIME EMPLOYEES OF THE STATE. The election shall be conducted by the State Court Administrator pursuant to rules promulgated by the Court of Appeals.

(4) The State Court Administrator is, ex-officio, the non-voting Secretary of each Commission.

Amend Paragraphs 3 and 10 of the Court of Appeals Selection Regulations to read as follows:

3. Any one who either resides or maintains an office within the State and who [is not an elected governmental official or a full-time Federal, State, or municipal official] MEETS THE ELIGIBILITY REQUIREMENTS OF THE EXECUTIVE ORDER ESTABLISHING JUDICIAL NOMINATING COMMISSIONS is eligible to serve as the Appellate Commission member from the Appellate Judicial Circuit in which he either resides or maintains his office.

10. Any eligible voter under Regulation 9 who [is not an elected governmental official or a full-time Federal, State, or municipal official or employee] MEETS THE ELIGIBILITY REQUIREMENTS OF THE EXECUTIVE ORDER ESTABLISHING NOMINATING COMMISSIONS is eligible for election to the Trial Court Commission for that Judicial Circuit in which he maintains his principal office.

6. Terms of Commission Members Should be Made to Coincide with the Governor's Elected Term.

Although the issue was not raised at the 1976 Conference, subsequent events have made it desirable to clarify the term of office provisions of the Executive Order.

The Acting Governor has indicated that he reads the 1974 Order as meaning that terms last during the full period of time for which the Governor was elected. To make this clear, Paragraphs 3(b) and 4(b) of the Order should be amended to read as follows:

> The terms of the members of the [Commission][8/] [Commissions][9/] [are coextensive with the term of the Governor] EXTEND TO THE DATE OF QUALIFICATION OF THE GOVERNOR ELECTED AT EACH QUADRIENNIAL ELECTION, and until their successors are duly chosen.

B. Commission Procedures.

1. Press Releases Should be Used When Judicial Vacancies Occur. (Paragraph 2).

The Executive Order does not spell out what procedures are to be used to give notice of an existing or forthcoming judicial vacancy. This subject is addressed in an Administrative Order adopting rules of procedure for the Appellate and Trial Courts Judicial Nominating Commissions, promulgated by the Chief Judge of the Court of Appeals on March 1, 1975.[10/] The Administrative Order directs the Commission's Secretary to notify the State Bar Association "and other appropriate Bar Associations of the vacancy." It also directs him to "provide for newspaper notice of the existence of the vacancy" in consultation with the commission chairman.

8/ Paragraph 3(b) (Appellate Commission)
9/ Paragraph 4(b) (Trial Court Commission)

10/ This Order was promulgated pursuant to Paragraph 6.(a) of the Executive Order. The Administrative Order of March 1, 1975, and a subsequent Administrative Order of June 19, 1975, may be found in Appendix C of Appendix 1.

The general practice as to newspaper notice has been the insertion of announcements in the Daily Record. These are run at least three times per week for at least three consecutive weeks in the Eighth Circuit (Baltimore City) and at least three times per week for at least two consecutive weeks in the other parts of the State.

A few commissions, notably the Fifth Circuit Commission, have supplemented this Daily Record notice with some sort of press release procedure. The press releases often give a general description of commission functions and operations. While the Daily Record notice plus notices to bar associations probably are adequate to advise lawyers of a vacancy, a press release published in a local newspaper may be much more effective as a means of getting information to the general public.

The conferees generally viewed the press release procedure as desirable. The consensus was that these could be good vehicles to explain commission operations to the public and might also elicit from some citizens comments or recommendations about potential candidates. However, the conferees recognized that because of the limited facilities of the Administrative Office of the Courts, and because of the importance of local contact with local newspapers, the press release procedure could be more effectively handled through a commission chairman or member familiar with the local scene. Consequently, the Conference recommended that: "Press releases are to be utilized, and they should be handled locally by a commission chairperson or member designated by the commission."

This recommendation may be implemented by the following amendment to Rule 1 contained in the Administrative Order promulgated by the Chief Judge of the Court of Appeals on March 1, 1975:

> 1. Upon notification by the Secretary that a vacancy exists or is about to occur in a judicial office for which a Commission is to make nominations, the Chairman in consultation with the Secretary, shall establish a date for an initial Commission meeting to consider nominations for the vacancy. The Secretary shall advise Commission members of the date, place, and time of the meeting and shall notify the Maryland State Bar Association, Inc., and other appropriate bar associations of the vacancy. In addition, the Secretary, in consultation with the Chairman, shall provide for APPROPRIATE newspaper notice of the existence of the vacancy [as appropriate], AND THE CHAIRMAN OR SOME OTHER MEMBER DESIGNATED BY THE COMMISSION, SHALL ISSUE ONE OR MORE PRESS RELEASES TO ONE OR MORE NEWSPAPERS CIRCULATED WITHIN THE CIRCUIT IN WHICH THE VACANCY EXISTS. THE PRESS RELEASE SHOULD NOTE THE VACANCY, EXPLAIN THE RESPONSIBILITIES AND FUNCTIONS OF THE NOMINATING COMMISSION, AND INVITE COMMENTS BY THE PUBLIC WITH RESPECT TO QUALIFIED CANDIDATES TO FILL IT.

2. Informal Recruiting Should be Encouraged. (Paragraph 3).

Paragraph 6(b) of the Executive Order presently urges commission members to "seek ... applications of proposed nominees ...." Actual practice in this regard seems to vary considerably from commission to commission, although commissioners as a group favor the concept of recruiting.

For example, Appellate Commission members not infrequently contact persons they think would make desirable candidates, and urge them to submit their names. This procedure is less common on some of the Trial Court Commissions.

At the Conference, there was some debate as to the benefits of formal recruiting, under which persons would be invited to submit their names by some sort of commission action, as opposed to informal recruiting, involving only action by individual commission members. The Conference supported the concept of informal recruiting, but thought that the matter should be left to the initiative of individual commission members. Consequently, no amendment to any document is proposed in this regard.

3. A Uniform Personal Data Questionnaire Should be Used by all Commissions. (Paragraphs 8 and 9).

For ease of administration and to assure that essential data are gathered for all candidates, the conferees decided that a standard questionnaire should be utilized by all commissions. While there was some concern about the possible need for gathering more extensive medical or psychiatric histories, the Conference rejected this proposal and instead recommended that essentially the form now used in the Third and Eighth Circuits be adopted as the standard, with an additional question about involvement in litigation.

Since the Conference, one Commission has also suggested the desirability of requesting names of at least three references. A questionnaire conforming to the Conference proposals appears in the early portions of the report, following the consolidated redraft of the Executive Order and other documents.

As the Conference pointed out, a standard questionnaire could be implemented simply by its preparation in the Administrative Office of the Courts. However, it seems to me that if the policy of uniformity is to be adopted and is to be truly effective, the Executive Order should make this plain. Thus, I propose the following amendment to Paragraph 6(b) of the Executive Order:

6.

> (b) Upon notification by the Secretary that a vacancy exists or is about to occur in a judicial office for which a Commission is to make nominations, the Commission shall seek and review applications of proposed nominees for the judicial office. APPLICATION SHALL BE MADE ON THE FORM PRESCRIBED BY THE SECRETARY. [Remainder of Paragraph 6(b) to remain without change].

4. Provisions Should be Made to Facilitate a Commission's Obtaining Information Beyond that Contained in the Personal Data Questionnaire. (Paragraph 13).

Under present procedures, there is nothing to inhibit commission members from obtaining whatever information they deem apporpriate from whatever sources they deem appropriate, in order to supplement information contained

in the personal data questionnaire. Some commission members exercise this privilege; others do not. The personal reference information now provided for in the questionnaire discussed under Paragraph 3, above, should be of some assistance in this regard.

Nevertheless, a majority of the Conference members thought that this authority should be made explicit, and that there should be some reference to possible sources of such information, such as the Attorney Grievance Commission, judges, and law-enforcement agencies.

Maryland Rule BV 8.b. (4) authorizes the Attorney Grievance Commission to give appropriate information to a judicial nominating commission, acting through its chairman. Advisory Opinion No. 28 of the Judicial Ethics Committee (April 3, 1975) indicates that it is appropriate for a judge "to express an opinion regarding the professional qualifications of an individual who is being considered for appointment to judicial office" when inquiry is made by a nominating commission member. However, problems may exist with respect to obtaining criminal history record information, in view of the enactment of Chapter 239, Acts of 1976, codified as Article 27, Sections 742 and following of the Code.

Article 27, §749, which takes effect December 31, 1977, provides that: "A criminal justice agency and the central repository may not disseminate criminal history record information except in accordance with the applicable Federal law and regulations."

The Federal regulations contain rather stringent prohibitions against the release of criminal history record information, particularly non-conviction data, to any agency except a criminal justice agency. However, §20.21 (b)(2) of those regulations (41 CFR 11715, March 19, 1976) permits dissemination to any individual or agency "for any purpose authorized by ... Executive Order...."

Therefore, it is recommended that Paragraph 6(c) of the Executive Order be amended as follows:

6.

(c) The Commission shall evaluate each proposed nominee. IN THE COURSE OF ITS EVALUATION, A COMMISSION MAY SEEK INFORMATION BEYOND THAT CONTAINED IN THE PERSONAL DATA QUESTIONNAIRE SUBMITTED TO IT. IT MAY OBTAIN PERTINENT INFORMATION FROM KNOWLEDGEABLE PERSONS KNOWN TO COMMISSION MEMBERS, THE ATTORNEY GRIEVANCE COMMISSION, JUDGES, PERSONAL REFERENCES GIVEN BY THE CANDIDATE, CRIMINAL JUSTICE AGENCIES, OR OTHER SOURCES. A CRIMINAL JUSTICE AGENCY, INCLUDING THE CENTRAL REPOSITORY, IS AUTHORIZED TO RELEASE CRIMINAL HISTORY RECORD INFORMATION, INCLUDING CONVICTION AND NON-CONVICTION DATA, TO A COMMISSION, UPON THE REQUEST OF THE COMMISSION CHAIRMAN, FOR THE PURPOSE OF EVALUATING A CANDIDATE. [Balance of Paragraph 6(c) to remain in present form].

5. Provisions Should be Made to Permit a Candidate to Respond to Substantial Adverse Information

Although the Conference did not consider the matter expressly, the previous recommendations open some additional problem areas. If a Commission obtains information beyond that contained in the personal data questionnaire, and if some of that information should be of a substantially adverse nature, what should be done about permitting the candidate to respond to it? Without getting into major constitutional law debates, it seems not unreasonable that the candidate should have at least some opportunity to refute information of this kind.

The precise mechanism for response perhaps need not be spelled out at this juncture. One possibility, obviously, is the interview process discussed below. But it does seem fair, at least to me, that a commission should be required to advise a candidate of any substantial adverse comment and to give the candidate some opportunity to reply.

The following amendment to the Chief Judge's Administrative Order of March 1, 1975, might achieve this, while still permitting a reasonable degree of flexibility in its procedures and deliberations. I emphasize that this proposal is mine, and not one made by the 1976 Conference.

Amend Rule 3, as set forth in the Chief Judge's Administrative Order of March 1, 1975, to read as follows:

3. Each Commission shall evaluate every person who files a questionnaire with the Secretary. A Commission may conduct personal interviews or any other investigation deemed necessary. IF A COMMISSION RECEIVES SUBSTANTIAL ADVERSE INFORMATION ABOUT A CANDIDATE, IT SHALL EITHER INFORM THE CANDIDATE OF THAT INFORMATION, AND GIVE HIM AN OPPORTUNITY TO RESPOND TO IT, OR ELSE IGNORE THE ADVERSE INFORMATION IN ITS EVALUATION OF THE CANDIDATE. [Balance of Rule 3 to remain as is at present].

6. An Understanding Should be Reached as to the Form and Content of Bar Association Recommendations. (Paragraphs 7 and 14).

Paragraph 6 (b) of the Executive Order requires each commission to "request recommendations from" the Maryland State Bar Association and "other appropriate bar associations...."

This directive has been met in a variety of ways, depending upon procedures used in the different bar associations. For example, the Maryland State Bar Association and the Bar Association of Baltimore City each has a committee that meets for the purpose of considering candidates and that submits recommendations to the nominating commission. The State Bar Association classifies the person it considers as highly qualified, qualified, unqualified, or insufficient information. The City Bar Association simply submits, in alphabetical order, the names of persons it finds qualified.

Other bar associations hold membership meetings to vote on a list of persons to be recommended. Still others, such as the Montgomery and Prince George's County Bar Associations, utilize written polls. These polls vary in form.

These differing procedures have caused some problems among the commissions, since a recommendation from one bar association may not mean precisely the same thing as a recommendation from another. In addition, there has sometimes been concern about just how determinations are made as between such categories as highly qualified and qualified.

There have been communications between some of the commissions, and some of the bar associations, particularly the Maryland State Bar Association, and procedures have been modified to some degree as a result of these communications.

The Conference rejected the suggestion that it might be useful to ask bar representatives to meet with the commissions to explain in more detail the basis for bar recommendations.

I think it is probably also fair to say that a majority of the conferees believed that unduly strict regulation of bar association procedures would be inappropriate, but that each bar association should be allowed some room for use of procedures with which it felt comfortable. On the other hand, the Conference also concluded that it would be desirable for bar associations to adhere to certain minimum guidelines. Those adopted were as follows:

> That any bar group making recommendations to a commission be requested to adhere to the following guidelines:
>
> 1. If the recommendation is based on a poll of bar members, the report to the commission should reveal all questions asked in the poll, and the number of responses (affirmative, negative, or non-response) if applicable, to each question. The report should also show the number of people polled and the number of respondents.
>
> 2. If an association is involved, [and a vote is taken at an association meeting,] [10a/] the number of persons attending the meeting and the total number of members of the association should be stated. [If a committee handles the function, a] [10a/] quorum should be established, including a "local" quorum in the case of groups, like the Maryland State Bar Association, having both "general" and "local" members. In either case, the votes for each candidate in each category should be listed by "yea", "nay", and "abstention".

10a Words in brackets apparently inadvertently omitted from Conference guidelines.

It is suggested that neither the Executive Order nor the Chief Judge's Administrative Orders be amended to reflect these positions. While the guidelines could be reflected in some official document, it seems preferable for the present to attempt to work out agreeable procedures by negotiation with the various bar associations, thereby allowing for a degree of flexibility and continuing experimentation looking towards the improvement of bar association recommendations.

7. Names of Applicants Should be Kept Confidential; Commissions Should Not Release Personal Data Questionnaires to Bar Associations or Bar Committees. (Paragraphs 10, 11, and 12).

Two sets of issues are involved here. One relates to the general question of publication of names of all persons who apply to a commission. The other relates to whether the personal data questionnaires submitted by these persons should be turned over by a commission to a bar association, bar committee, or any other body.

a. Confidentiality of Names of Applicants. The commissions have all operated under the theory that the name of every person who applies should be kept confidential, and that only the names of those actually nominated to the Governor should be made public. Interestingly enough, this theory of confidentiality is not expressly supported by language in either the Executive Order or the Chief Judge's Administrative Orders, although it may be implied from Paragraph 6 (d) of the Executive Order and Paragraph 4 of the Administrative Order of March 1, 1975, since both of these direct the commissions to release its report to the public concurrently with submission to the Governor, thereby suggesting that nothing is to be released before then, and that nothing beyond the report to the Governor (the names of the nominees) is to be released at all.

At the Conference, serious questions were raised about the desirability of this confidentiality. It was pointed out, for example, that it would be impossible for members of the public or even members of the bar to make comments

about candidates if they did not know who the candidates were. Thus, the commissions may be deprived of a valuable source of information about applicants.

On the other hand, a majority of the Conference members concluded that publicizing the names of every applicant would tend to inhibit applications by some well-qualified individuals. In view of persistent problems of small numbers of applicants in any event, (at least with respect to many of the commissions) it was thought that nothing should be done that might further reduce these numbers.

While recent newspaper stories involving the filling of judicial vacancies suggest that the practice of confidentiality may be recognized more in the breach than in the observance, the publication of names of candidates in the press does not necessarily mean that commission members have revealed this information. Lists of applicants are routinely sent to a committee of the State Bar Association and to a committee or president of any local bar association in the county where a vacancy exists. Thus, persons having this information available are quite numerous.

The Conference did not recommend termination of the practice of sending names to appropriate bar associations or bar committees, but rather supported the proposal that "present procedures prohibiting general public release of all applicants' names be maintained, with only the names of the actual nominees released to the public." I suggest that this policy now be specifically set forth in the Executive Order, and that it should also be made clear that the names of all applicants may be submitted to an appropriate bar group. At the same time, I propose to take up with the bar groups the problem of leaks. If this cannot be solved effectively, it might be necessary to consider changing the policy to prohibit release of names to bar groups. This would at least narrow the scope of any investigation of the problem of leaks to the Administrative

Office and the commission members themselves.

b. Personal Data Questionnaires. Prior to the Conference, it was a common practice to forward personal data questionnaires to appropriate bar groups. However, the Conference members decided that this should be stopped.

While the Conference recognized that the questionnaires may be useful to a bar association committee, it also felt that the questionnaires sometimes contain potentially embarrassing information about past criminal records and the like, and that it would encourage full disclosure to a commission to make it clear to each applicant that his questionnaire was only for commission use, except that the questionnaires of actual nominees should be forwarded to the Governor for his use.

This policy has actually been placed in effect. At the same time, applicants have been advised that if they wish to do so, they may voluntarily submit copies of their questionnaires to the appropriate bar groups. This has resulted in a working compromise under which the bar groups generally get the information they desire, but this is by decision of the applicant, not by action of the commission. This particular policy is reflected in the form of questionnaire discussed in Paragraph 3, above.

It is suggested that these policies as to confidentiality should be implemented by adding a new Paragraph 7 to the Executive Order, with the present Paragraphs 7, 8, and 9 to be renumbered as Paragraphs 8, 9, and 10. New Paragraph 7 would read as follows:

7. CONFIDENTIALITY.

EXCEPT FOR THE NAMES OF THOSE INDIVIDUALS ACTUALLY NOMINATED TO THE GOVERNOR BY A COMMISSION, THE NAME OF EACH INDIVIDUAL WHO SUBMITS A PERSONAL DATA QUESTIONNAIRE TO A COMMISSION IS CONFIDENTIAL AND MAY NOT BE MADE PUBLIC BY ANYONE. HOWEVER, THE SECRETARY MAY RELEASE NAMES OF THESE INDIVIDUALS TO A BAR ASSOCIATION COMMITTEE OR TO THE PRESIDENT OF A BAR ASSOCIATION, UPON RECEIVING SATISFACTORY ASSURANCES THAT THE COMMITTEE OR PRESIDENT WILL NOT RELEASE OR PERMIT THE RELEASE OF THE NAMES TO THE PUBLIC. A PERSONAL DATA QUESTIONNAIRE SUB-

MITTED TO A COMMISSION IS CONFIDENTIAL AND MAY NOT BE RELEASED BY ANYONE OTHER THAN THE APPLICANT, EXCEPT THAT THE SECRETARY SHALL FORWARD TO THE GOVERNOR THE PERSONAL DATA QUESTIONNAIRES OF THOSE INDIVIDUALS ACTUALLY NOMINATED TO THE GOVERNOR BY A COMMISSION.

8. The Present Provisions Pertaining to Commission Member Disqualification for Relationship with a Candidate Should Not be Changed. (Paragraph 6).

By Administrative Order dated June 19, 1975 (Appendix C of Appendix I) the Chief Judge of the Court of Appeals promulgated Procedural Rule 4A providing as follows:

> (a) A commission member may not attend or participate in any way in commission deliberations respecting a judicial appointment for which (1) a near relative of the commission member by blood or marriage, or (2) a law partner, associate, or employee of the commission member is a candidate.
>
> (b) For the purpose of this Rule, "a near relative by blood or marriage" includes a connection by marriage, consanguinity or affinity, within the third degree, counting down from a common ancestor to the more remote.

So far as relatives are concerned, this procedural rule provides the same standard for disqualification of a commission member as does Judicial Ethics Rule 2, Maryland Rule 1231, with respect to disqualification of a judge; see also Article IV, §7 of the Maryland Constitution. The disqualification prohibition with respect to business or professional connections is also similar to guidelines applicable to the judicial branch of government.

This rule has been applied to prohibit a person within the provisions of the Rule from any participation in a commission meeting if that the meeting deals with consideration of candidates and one of the candidates is within the proscribed degree of relationship.

Because of the importance of commission activity and the need for both the appearance and the fact of impartial and unbiased action by commission members, no one seriously quarrels with a need for some rule of this type. However,

the specific rule has been criticized as both too lenient and too strict.

Those who think the present Rule too lenient point out that aside from relatives, there could be various business associations not actually covered by the Rule that could affect the impartiality of a commission member.

Those who think the present Rule too strict argue that a commission member's position is not necessarily affected one way or another by what may be a relatively distant relationship, such as a cousin who is an applicant. They also say that in any event, the most that should be required is the exclusion of the commissioner relative from the voting session, so that the commission may have that commissioner's thinking as to other possible candidates.

Clearly, any disqualification standard of this sort is to some degree arbitrary. Some people have cousins to whom they are very close; others have cousins scarcely known to them. Some have law associates who may occupy a position of respect over and above that of most relatives; others may have law associates for whom they have very little respect at all.

If there is to be at least a minimum appearance of impartiality, a line must be drawn somewhere, and it would seem that the present Rule 4A is a reasonable mechanism for drawing the line, based as it is on the present Canons of Judicial Ethics. Moreover, it does not seem appropriate that a commissioner disqualified from voting under Rule 4A should be allowed to participate at all in the meeting, since the public might assume that his discussion for or against the relative or professional associate might sway the votes of other commissioners.

Apparently, the Conference was of like mind, since it voted to retain Rule 4A "in a form no less stringent than its present form."

On the other hand, the Conference also voted not to extend the strict non-participation provisions of Rule 4A to other situations. Instead, it was the view of the Conference that the Rule should be expanded to require disclosure

of less close and substantial personal, commercial, or political relationships, with further participation following that disclosure to be determined by vote of a majority of the commission members present at the meeting.

This could be accomplished by adding a new subsection to Rule 4A, as follows:

4A.

(C) IF A COMMISSION MEMBER AND A CANDIDATE FOR NOMINATION TO JUDICIAL OFFICE HAVE A PERSONAL, BUSINESS, PROFESSIONAL, OR POLITICAL RELATIONSHIP WHICH IS SUBSTANTIAL, ALTHOUGH NOT AS CLOSE AS A RELATIONSHIP DESCRIBED IN THE PRECEDING SUBSECTIONS OF THIS RULE, THE COMMISSION MEMBER SHALL DISCLOSE THE RELATIONSHIP TO THE OTHER MEMBERS OF THE COMMISSION PRESENT AT A MEETING TO CONSIDER CANDIDATES FOR THE VACANCY. THE DISCLOSING COMMISSIONER'S FURTHER PARTICIPATION IN THAT MEETING SHALL BE DETERMINED BY VOTE OF A MAJORITY OF THE OTHER COMMISSION MEMBERS PRESENT AT THE MEETING.

9. Interviews Should be Encouraged.(Paragraph 15).

Prior to the 1976 Conference, no commission conducted interviews of candidates on a formal basis, although occasionally commission members sought out candidates and had personal talks with them.

When this matter was discussed at the Conference, a few conferees opposed the interview procedure on the ground that it would be of dubious value. Those taking that position apparently felt that little real knowledge of a candidate could be obtained in an interview and that someone who could present himself well might unduly impress commission members as opposed to a person with equally good basic qualifications, but who was less articulate and persuasive.

On the other hand, most of the conferees favored the concept of interviewing as a valuable means of permitting commission members, particularly lay members who might not be personally acquainted with candidates, to obtain some understanding about a candidate beyond the information contained in the personal data questionnaire. Although the Conference did not favor mandatory interviews, it did adopt a recommendation that interviewing be encouraged, "in the discretion of a commission,

as a supplement to other sources of information." The Conference suggested such possible alternatives as full commission interviews or team interviews by subcommittees of a commission.

Since the 1976 Conference, I have encouraged the use of interviews by commissions. I am happy to report that Trial Court Commissions for the First, Fourth, Seventh, and Eighth Circuits, have utilized interviews, as has the Appellate Commission.

The Second and Sixth Circuit Commissions have scarcely met since the 1976 Conference, and in at least some cases have met when there was only a single candidate (as when an incumbent judge was a candidate for reappointment) thus not presenting a pressing need for interviewing.

The Third Circuit Commission at one point voted to proceed with interviewing, but later withdrew from this position because of concerns about interviewing very large numbers of candidates. For reasons not entirely clear to me, the Third Circuit Commission, at least with respect to vacancies in Baltimore County, receives more applications on the average than any other commission. For the District Court, for example, that commission averages over 29 applications per vacancy. That is a formidable number of prospective interviews.

The Fifth Circuit Commission has resisted the interview procedures, although some members of that commission are interested in it.

I think it is fair to say that in every commission that has tried interviewing, the reaction of commission members has been generally favorable and in some cases extremely enthusiastic. The reaction among candidates has been uniformly favorable. My own observation is that interviewing does help commission members judge the qualifications of candidates and tends to produce more informed and meaningful discussion about the candidates. No commission that has begun interviewing has later abandoned the procedure.

Despite the apparent value of interviewing, we have been experimenting with the procedure for less than a year and I think it would be desirable to work with the procedure for a longer period before making it mandatory. But I strongly agree with the Conference view that interviewing should be encouraged. To that end, I suggest the following amendment to Paragraph 3 of the Chief Judge's Administrative Order of March 1, 1975:

> 3. Each Commission shall evaluate every person who files a questionnaire with the Secretary. A Commission may conduct [personal interviews or] any other investigation deemed necessary. EACH COMMISSION IS ENCOURAGED TO CONDUCT A PERSONAL INTERVIEW OF EVERY CANDIDATE WHO APPLIES TO IT, AT LEAST WITH RESPECT TO THAT CANDIDATE'S INITIAL APPLICATION TO THE COMMISSION. THE INTERVIEWS MAY BE CONDUCTED BY THE FULL COMMISSION OR BY A TEAM OR COMMITTEE OF THE COMMISSION. [Remainder of Paragraph 3 to remain as at present].

10. Commission Screening and Voting Procedures Should be Modified So as to Require a Specified Minimum Number of Commission Members to be Present at a Voting Session; to Prohibit Voting For a Specific Minimum Number of Candidates; and to Prohibit Proxy and Absentee Voting; but the Number of Votes Required to Nominate Should Remain at No Less Than Seven. (Paragraph 5).

a. Minumum Number of Commission Members Required to be Present.

Neither the 1974 Executive Order nor the 1977 amendments expressly require the presence of any particular number of commission members at a voting session. Both the 1974 Order and the 1977 amendments do require that nomination be by vote of at least a majority of the full authorized membership of a commission, which in effect means that there must be not less than seven votes to nominate.

On a number of occasions, some of the commissions have been plagued by problems of poor attendance. For example, on at least one occasion a commission met with only seven members present. This meant that there had to be a unanimous vote of those present in order to nominate anybody.

There are obvious drawbacks to sparse attendance. Aside from the practical difficulties of producing a list, the commission as a whole is deprived of the information and insights that might be provided by the absent members.

On the other hand, a requirement that the full membership of a commission be present for a vote would be unrealistic. This would mean that a single member could effectively prevent commission action altogether simply by not attending a meeting. And even putting aside the possibility of deliberate action of this sort, commission members do get sick, take vacations, have conflicting engagements, and occasionally must disqualify themselves under Rule 4A.

The 1976 Conference debated these problems at length. There was general agreement that there should be a requirement for attendance by some number greater than a simple majority at the time of a final vote, although a proposal that at least ten members be present for voting was rejected by a tie vote.

As a compromise, the Conference adopted a recommendation "that no final vote of a commission be taken unless at least nine commission members are present at the time, but that nomination still be permitted by vote of at least a majority of the full authorized membership of the commission."

b. Measures Should be Taken to Help Improve Attendance at Commission Meetings.

As noted above, commission attendance can be a problem, although it should be emphasized that the majority of commission members are diligent and conscientious in performing their duties. Nevertheless, there is one member of the Fifth Circuit Commission who has never attended a single meeting; one member of the Eighth Circuit Commission who rarely attends; and a member of the Appellate Commission who has missed two out of the last three meetings. When this kind of situation is added to the possibility of sickness and disqualification, problems can arise

not only with respect to producing a minimum seven votes for an adequate list, but also of meeting a minimum quorum requirement, such as proposed in the preceding paragraph.

Some sort of exhortation from the Acting Governor might help encourage some commission members by reminding them of the importance of their task and of the need for the presence of each commission member at every meeting unless disqualified. However, it also would seem desirable that there be some provision for elimination from membership of those commission members who virtually never attend meetings. The Conference discussed Article 41, §4 of the Code, which probably does not apply to commissions and in any event would not apply to lawyer members who are not appointed by the Governor. But the Conference made no recommendation in this regard.

It is my recommendation that the Executive Order be amended to provide that if a commission meets at least twice in any calendar year, a commission member who fails to attend at least half of the meetings in that year is automatically removed from membership unless he has been disqualified under Rule 4A.

c. Voting for a Specified Minimum Number of Candidates.

Prior to the 1974 Executive Order, it was a common practice on some commissions to require members to vote for at least a certain minimum number of names. The minimum was normally set with reference to the minimum specified by Paragraph 4(e) of the Executive Order.

The result of this procedure was to produce lists that complied with the minimum requirements of the Executive Order. But the effect also was to force commission members, on some occasions, to vote for persons they did not conscientiously believe to be fully qualified, because they had to vote for at least that minimum number of names in order to have their ballots counted.

The Conference adopted a recommendation "that members not be required to vote for any specified number of candidates" and that practice has now become

general in all commissions.

This change in procedure may be one cause of some of the rather short lists that have been submitted, although lack of well-qualified applicants may be a more fundamental cause. However, it is believed to be sound policy that no commission member should be forced to vote for someone he does not truly believe to be qualified, merely in order to put a specified number of names on a list. Accordingly, it is recommended that the Chief Judge's procedural rules be amended to reflect the current practice.

d. Neither Proxy nor Absentee Voting Should be Permitted.

A proxy voting procedure is one whereby a commission member who cannot attend a meeting authorizes another commission member to cast a ballot for him, either for named candidates or simply in the discretion of the second commission member. An absentee voting procedure is one whereby a commission member who expects not to be present submits in advance a sealed ballot naming the candidates for whom he intends to vote.

Proxy voting would appear to be unlawful under the 1974 Executive Order, since that Order clearly requires a secret vote. By definition, a proxy vote cannot be secret, since the proxy is aware of the vote of the other member whose proxy he holds. The Conference voted to eliminate proxy voting.

Absentee voting does not quite so clearly violate the secrecy provisions, although practical violations of secrecy are easy to commit when the absentee ballot is being opened. However, except for the Appellate Commission, every nominating commission that has considered the issue of absentee voting since the 1976 Conference has rejected the concept.

There are several difficulties with absentee voting. One of them is that the absent member is deprived of the benefit of discussion by the other commission members as well as deprived of the advantages given by interview of candidates, either or both of which might change his vote. Moreover, some commissions who receive relatively large lists of candidates screen out some as obviously not

qualified, by informal screening procedures. It is possible that one or more of the persons on the absent member's ballot might be so screened out, thus causing the absent member in effect to waste his vote entirely.

It is recommended that the procedural rules be amended to eliminate both proxy and absentee voting. If provisions requiring attendance by not less than nine members at a voting session are adopted, and faithfully adhered to, the elimination of proxy and absentee ballots should not produce undue difficulties.

The recommendations contained in this Paragraph 10 could be accomplished through the following amendments:

a. Presence of Minimum Number of Commission Members.

Amend Paragraph 6(c) of the Executive Order to read as follows:

6.

(c) The Commission shall evaluate each proposed nominee. It shall select and nominate to the Governor the names of persons it finds to be legally and most fully professionally qualified. NOT LESS THAN NINE COMMISSION MEMBERS SHALL BE PRESENT AT THE VOTING SESSION. No person's name may be submitted unless he has been found legally and most professionally qualified by a vote of a majority of the entire authorized membership of the Commission, taken by secret ballot.

Amend Rule 3 of the Administrative Order of March 1, 1975 to read as follows:

3. Each Commission shall evaluate every person who files a questionnaire with the Secretary. A Commission may conduct personal interviews or any other investigation deemed necessary. It shall select and nominate to the Governor the names of the persons it finds to be legally and most fully professionally qualified. NOT LESS THAN NINE COMMISSION MEMBERS SHALL BE PRESENT AT THE VOTING SESSION. No person's name may be submitted unless he has been found legally and most professionally qualified by a vote of a majority of the entire authorized membership of the Commission, taken by secret ballot.

b. Removal of Members who Fail to Attend Meetings.

Amend Paragraph 3(b) and 4(b) of the Executive Order to read as follows:

> The terms of the members of the [Commission][11/] [Commissions][12/] are coextensive with the term of the Governor and until their successors are duly chosen. HOWEVER, IF [THE][11/] [A][12/] COMMISSION MEETS NOT LESS THAN TWICE IN ANY CALENDAR YEAR AND IF ANY MEMBER OF THE COMMISSION WHO IS NOT DISQUALIFIED FROM PARTICIPATION FAILS TO ATTEND AT LEAST 50 PERCENT OF THE COMMISSION MEETINGS HELD IN THAT CALENDAR YEAR, THE TERM OF THAT COMMISSION MEMBER IS AUTOMATICALLY TERMINATED AT THE END OF THE CALENDAR YEAR AND ANOTHER MEMBER SHALL PROMPTLY BE SELECTED TO REPLACE HIM.

c. No Voting for a Specified Minimum and

d. Prohibition of Proxy and Absentee Voting.

Amend Rule 3 of the Administrative Order of March 1, 1975 to read as follows:

> Each Commission shall evaluate every person who files a questionnaire with the Secretary. A Commission may conduct personal interviews or any other investigation deemed necessary. It shall select and nominate to the Governor the names of the persons it finds to be legally and most fully professionally qualified. IN DOING SO, EACH COMMISSION MEMBER SHALL VOTE ONLY FOR THOSE PERSONS HE CONSCIENTIOUSLY BELIEVES TO BE LEGALLY AND MOST FULLY PROFESSIONALLY QUALIFIED. VOTING BY PROXY OR BY ABSENTEE BALLOT IS NOT PERMITTED. No person's name may be submitted unless he has been found legally and most fully professionally qualified by a vote of a majority of the entire authorized membership of the Commission, taken by secret ballot.

11. There Should be No Change in the Minimum Number of Names to be Included On a List. (Paragraph 4).

At the time of the 1976 Conference, the 1974 Executive Order required the Appellate Commission to submit a list of not less than five names for each vacancy. The Trial Courts Commissions were required to submit minimum numbers varying from five to two, depending upon the lawyer population of the jurisdiction in which the vacancy existed. However, Paragraph 5(a)(2) in particular had the effect of permitting any Commission to submit as few as two names without seeking the prior permission of the Governor.

11/ Paragraph 3(b) (Appellate Commission)
12/ Paragraph 4(b) (Trial Court Commissions)

Since the effective date of the 1974 Order, there have been 55 lists of nominees submitted, excluding situations involving the expiration of the term of a judge, in which a small number of applicants is normal and in which the Governor usually gives permission to submit but a single name if the Commission so desires. In 14 of these situations, a Commission has submitted two or fewer names; this has generally occurred in the smaller counties with only a few members of the Bar and as to which two names would be acceptable in any event. However, it must be observed that the phenomenon has also occurred with respect to large counties such as Prince George's, with respect to Baltimore City, and with respect to appellate court vacancies.

There is a tension here between a Governor's natural desire not to have his hands bound by a nominating commission and a nominating commission's natural desire to submit only the names of the people it deems best qualified. At the 1976 Conference, it was proposed that the normal minimum be reduced to three. However, the Conference rejected this proposal on the grounds that it was too restrictive to be adopted as a general rule.

The Conference's recommendation was that the provisions as to minimum number of names remain unchanged. Of course, since that time the Acting Governor has promulgated his Executive Order of October 4, 1977 and some changes have been made in this regard, in general producing requirements for greater minimums with respect to the appellate courts and the larger counties in which trial court vacancies exist. It would appear that no further changes should be proposed at this time. Instead, we should await the actual effects of the 1977 Executive Order and take up on a case-by-case basis those situations in which a commission feels it cannot conscientiously recommend the minimum number of names and thus must seek the Governor's approval for a short list.

C. Existing Election Procedures for Judges at the Supreme Bench and Circuit Court Levels Should be Eliminated.

When the District Court was created in 1971, following a Constitutional amendment ratified in 1970, the General Assembly and the voters wisely approved provisions eliminating its judges from the elective process. A candidate for judgeship at this level, after nomination by a commission, is appointed by the Governor and confirmed by the Senate.

In 1976, the provisions with respect to judges of the appellate courts were modified as well. Presently, a candidate for an appellate court judgeship, after nomination by a nominating commission, is appointed by the Governor, confirmed by the Senate, and then must stand for retention in office in a non-competitive election in which the voters cast ballots either for or against the retention of the individual judge.

Thus, it is only judges of the Supreme Bench of Baltimore City and of the circuit courts of the several counties who must face the possibility of contested primary and general elections.

At several points in this paper, I have commented on problems relating to small numbers of candidates and short lists of nominees submitted to the appointing authority. I have suggested a number of possible reasons for these phenomena. I am convinced that the principal reason, or at least the most important single reason, has to do with the election problem at the Supreme Bench/circuit court level.

This is not easy to demonstrate statistically. In some of the larger jurisdictions, such as Anne Arundel, Montgomery, and Prince George's Counties, it is difficult to detect a clear pattern distinguishing numbers of applicants for District Court vacancies from numbers of applicants for circuit court vacancies. In at least Montgomery and Prince George's, the number of applicants for any vacancies tend to be relatively small in comparison to the lawyer

populations, suggesting that economic factors as well as political factors may be working.

A somewhat different pattern can be discerned in Baltimore City and Baltimore County. Because the pay of judges at the circuit court level is 15 percent greater than that of District Court judges, and because in the eyes of many lawyers, a circuit court judgeship is conceived of as more prestigious than a District Court judgeship (whether rightly or wrongly) one might assume that applicants for circuit court level appointments would at least equal those for District Court appointments. But in the two jurisdictions just mentioned, exactly the opposite is the case.

In Baltimore County, since the effective date of the 1974 Executive Order and excluding reappointment situations, the average number of applicants for each District Court vacancy has been 29.2 while the average number of applicants for each circuit court vacancy has been only 17.

In Baltimore City, over the same period of time and with the same exclusion, the average number of applicants for each District Court vacancy has been 17 and the average number of applicants for each Supreme Bench vacancy has been only 9.

Both of these jurisdictions contain large lawyer populations, that of Baltimore City probably exceeding 2,000. Something is radically wrong when an average of just under 9 people apply for a vacancy on that City's trial court of general jurisdiction. It is not hard to understand why commissions are virtually forced to submit short lists when the total number of applicants is so small.

As I have stated earlier, a number of explanations may be advanced for the situation. These include problems relating to compensation, generally lowered prestige of the judiciary, concerns regarding restricted activities permitted judges, reservations regarding alleged advance political decisions in judicial selection, and several others. But I am convinced that a major factor is the concern about the election process for circuit court judges. The 1976 Conference shared this concern. Without dissent, it adopted the following Resolution:

> We urge the General Assembly to enact a bill to submit a Constitutional amendment to the voters of Maryland applicable to the circuit courts of the counties and the Supreme Bench of Baltimore City to provide for the selection, appointment, and retention of the judges of these courts in the same manner as now provided for the judges of the appellate courts of this State.

Since the Conference, the Eighth Circuit Commission has also expressed special concern about this problem and has itself taken a similar position.

Obviously, the implementation of this recommendation cannot be achieved by amendments to the Executive Order, the Court of Appeals Selection Regulations, or the Procedural Rules. A Constitutional amendment is needed. Perhaps 1978 is not the most advantageous time to put this proposal to the General Assembly. The 1979 session might be more advantageous, even though a Constitutional amendment adopted at that session could not be voted upon by the people until 1980.

Such a Constitutional amendment might well include constitutional provisions providing for the nominating commission process which has in general worked well. Here again, postponement of legislative action until 1979 might be desirable, since it would give some further period for working with any changes adopted pursuant to the recommendations contained in this paper before moving to embody the nominating commission concept in the Constitution, where it eventually should be placed.

Unfinished Business.

Although the members of the December 1976 Nominating Commission Conference worked long and hard, they were unable to complete the full agenda presented to them. Some of these deserve mention here so that this Report will be as complete as possible.

A. Dearth of Applicants.

Except for the Resolution stated above, relating to the election process at the circuit court level, the Conference itself did not have time to discuss

the problem of lack of applicants. I have noted this problem on several occasions and suggested some approaches to it.

I should like to add to the prior discussion only some reinforcing data extracted from the 1975 Questionnaire circulated to all nominating commission members. The respondents to that questionnaire selected as first choice among factors inhibiting people from applying for judgeships inadequate compensation. 26 lay members and 22 lawyer members took this position. The second highest rating for inhibiting factors was unwillingness of potential applicants to face election (23 lay people and 17 lawyers). As one lawyer respondant put it, "the combination of [salary considerations and election requirements] are almost insuperable" obstacles to many potentially well-qualified applicants. But, as already noted, there is nothing an Executive Order can do to remedy these problems.

B. Maintenance of Files.

Particularly for some lay members, the problem of retaining documents received during the nominating commission process can be difficult. It is sometimes desirable to retain personal data questionnaires for a period of time because there is a tendency among some to re-apply to the same commission on a number of occasions. On some commissions, a procedure was developed whereby a person so reapplying would not have to file a completely new personal data questionnaire, but could simply reactivate his prior questionnaire by a letter. Of course, the effectiveness of this procedure depends upon commission members having copies of the prior questionnaire and since reactivation might extend over a period of years, this could produce storage problems for some.

To strike a reasonable balance, it is suggested that Rule 2 of the Administrative Order of March 1, 1975 be amended as follows:

> Personal data questionnaires for any applicant for appointment to the judicial vacancy shall be made available through the Chairman of the Commission or any Commission member, or by the Secretary. Every completed questionnaire shall be filed with the Secretary on or before a date specified in the public notice

advising of the vacancy. The Secretary shall distribute to each Commission member a copy of every questionnaire filed with him. AN INDIVIDUAL WHO REAPPLIES TO A COMMISSION WITH WHICH HE HAS FILED A PERSONAL DATA QUESTIONNAIRE WITHIN TWELVE CALENDAR MONTHS IMMEDIATELY PRECEDING THE REAPPLICATION NEED NOT FILE A COMPLETE NEW QUESTIONNAIRE, BUT MAY SUBMIT TO THE SECRETARY A LETTER STATING THAT HE IS REAPPLYING AND SETTING FORTH ANY CHANGES THAT HAVE OCCURRED SINCE THE SUBMISSION OF HIS QUESTIONNAIRE. THE SECRETARY SHALL DISTRIBUTE THESE LETTERS TO COMMISSION MEMBERS IN THE SAME MANNER AS QUESTIONNAIRES. Distribution shall be completed not less than three days prior to the meeting date.

C. Time-lag From Filing Deadline to Meeting.

Occasionally, concern has been expressed about what some believe to be too short a time from the deadline for filing personal data questionnaires to the commission meeting date. Rule 2 of the Chief Judge's Administrative Order of March 1, 1975 in effect requires at least a three day delay, but this period of time is unduly short to allow for bar association recommendations, in many cases. As a practical matter, at least a week and usually a longer period elapses between the filing deadline and the actual commission meeting date.

Some respondents to the 1975 Questionnaire suggested that 7 to 10 working days should be required between the filing deadline and the commission meeting date. This would mean 9 to 15 calendar days, and the latter time period at least could work to delay unnecessarily the operations of the nominating commission process.

Although the Conference did not address this problem, it seems to me that a reasonable compromise would be to require a delay of at least 7 calendar days from the filing deadline to the commission meeting. This would be a minimum, and necessary longer delays could be worked out in specific cases as needed and appropriate.

This recommendation could be accomplished by adding to Rule 2 of the

Administrative Order (quoted above) the following sentence:

> A COMMISSION MEETING MAY NOT BE HELD SOONER THAN SEVEN CLEAR CALENDAR DAYS FOLLOWING THE DATE SET AS THE DEADLINE FOR FILING PERSONAL DATA QUESTIONNAIRES.

D. The Standard of Legally and Professionally Most Fully Qualified.

Some commission members had voiced concern about ambiguities in the requirement that no person be nominated unless found to be "legally and professionally most fully qualified". However, no respondent to the 1975 Questionnaire had any concrete proposal for a better standard. Most respondents seemed to accept the notion that this standard means that commissions are supposed to nominate people who are more than merely "qualified" for the particular office in question.

Once again, the Conference did not discuss this problem, but I do not see it as a major difficulty and would suggest no change in this regard.

E. Should the Governor be Required to Make an Appointment Within a Limited Time?

Under the 1970 Executive Orders, commissions were activated by direction of the Governor. The procedure then frequently involved a considerable delay between the occurrence of a vacancy and the activation of a commission, simply because the Governor took no steps to direct the commission to act.

One of the purposes of the 1974 Order was to correct this situation. To that end, the 1974 Order provided that a commission would be activated by the Secretary.

This change has had its desired effect. With respect to 63 judicial vacancies occurring since the effective date of the 1974 Executive Order, in at least 36, not only has the commission been activated prior to the vacancy date, but it has actually had a list in the hands of the Governor prior to that date. Given the fact that some vacancies are not foreseeable, such as those caused by death, unannounced retirement, or appointment to another judicial office, this is a respectable record.

But the overall effect intended to be achieved, that of keeping judicial vacancies to an absolute minimum to assure the smooth operation of the judicial system, was not always achieved because under the previous administration there were delays, sometimes of several months, between the submission of the list of nominees and the actual appointment. This produced the same end result that failure to activate the commissions had - long-standing judicial vacancies.

For example, with reference only to vacancies that both occurred and were filled during fiscal 1976, the average delay between submission of names to the Governor and announcement of the appointment was about 2.6 months, with the longest delay being 5.3 months. In over a quarter of those appointments, the delay was 4 months or longer.

The Conference members did not have an opportunity to consider this problem, and it must be stated that in recent months, the problem has ceased to exist. That does not mean that it could not arise at some time in the future, but here again the solution, if one is required, would seem to be found in a Constitutional amendment which would require the Governor to appoint within some specified period of time following submission of the list, and which would shift the appointing power to some other authority upon the Governor's failure to act within the specified time.

It would seem that this is one of the matters that should be addressed in the future if it is decided to support a Constitutional amendment to establish the nominating commission system.

THE JUDICIAL NOMINATING COMMISSION PROCESS IN MARYLAND - BACKGROUND, DEVELOPMENT, AND CONSIDERATIONS FOR CHANGE.

by

William H. Adkins, II
State Court Administrator and
Secretary, ex officio, of
Judicial Nominating Commissions

October 1976

ACKNOWLEDGEMENTS

A number of people deserve thanks for help extended to me in connection with the preparation of this paper. I would like to acknowledge especially the valuable assistance of all the commission members who took the time and trouble to complete the lengthy 1975 questionnaire as well as these and other commission members who have been kind enough to discuss their perceptions of commission procedures and commission problems with me.

Great assistance was rendered by Maria Kendro and Amy Scherr, who were students at the University of Maryland School of Law, in tabulating the questionnaire results and in preparing a very capable analysis of them. Several portions of this analysis appear in the text of the following paper. In addition, they were good enough to comment on a draft of the paper. Julien Hecht, also a student at the Maryland Law School, helped greatly by editing the paper.

Finally, I cannot omit a word of thanks to my secretary, Jean Carter, who had the unenviable task of trying to decipher the 70-odd handwritten pages that constituted the initial working draft of the document.

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GENERAL BACKGROUND

In Maryland, virtually all judicial vacancies are filled initially by gubernatorial appointment.[1/] While the Constitution places no limit on the Governor's exercise of this power (other than establishing the minimum qualifications for judges contained in Art. IV, §2 of the Constitution, and the maximum age limit in §5), Governor Marvin Mandel in 1970 promulgated two executive orders establishing procedures to assist him in this regard. The Executive Order of July 6, 1970 created an Appellate Courts Judicial Selection Commission, and the Executive Order of July 17, 1970 created eight Trial Courts Judicial Selection Commissions, one for each of the eight judicial circuits of the State.

Each of these commissions consisted of an equal number of lay and lawyer members and a chairman (who could be either laypersons or lawyers). Under the system established in 1970, the Governor undertook to convene the

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1/ MD. CONST. art IV, §§5 and 41D. Judges of the Orphans' Court are not subject to the selection procedures discussed in this paper, and nothing contained herein is intended to apply to selection or election proceedings in those courts; see CONST. art. IV, §40.

appropriate commission when a judicial vacancy occurred within its jurisdiction. The commission was then to screen potential candidates for the vacancy, and submit lists of qualified persons to the Governor. Although the 1970 Executive Order did not expressly so provide, the Governor undertook to limit (and in fact limited) his judicial appointments to the persons whose names were submitted to him by the commissions.

Thus, some six years ago, Maryland joined the growing number of states engaging in one form or another of merit judicial selection.[2/]

The operation of the selection commissions created in 1970 was studied by the Maryland State Bar Association Special Committee on Judicial Selection and Tenure which, in 1971 and 1972, found that the "commission system is working well and should be retained."[3/] However, the Committee also made certain recommendations for changes in the commission procedure.[4/] Most of these were included in an Executive Order of December 18, 1974 by which Governor Mandel reorganized the commissions.[5/] The present commissions are operating under the 1974 Order, which became fully effective March 1, 1975. It may be

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2/ For a general discussion of this concept, see A. ASHMAN and J. ALFINI, THE KEY TO MERIT JUDICIAL SELECTION: THE NOMINATING PROCESS (Am. Jud. Soc. 1974). Some 24 jurisdictions now utilize some form of the nominating commission procedure: see DUNN, Judicial Selection in the States: A Critical Study and Proposals for Reform, 4 HOFSTRA L. REV. 267, 284 (1976). Of course, the nominating commission procedure is but one aspect of "merit" selection. Some limit on "political" elections of judges (e.g., the non-competitive election) is a common adjunct. For some discussion of Maryland's efforts to move in this area, see, e.g., MSBA Section of Judicial Administration, REPORT OF SPECIAL COMMITTEE ON JUDICIAL SELECTION TO 1971 WINTER MEETING, at 2-3 (1971); MSBA Special Committee on Judicial Selection and Tenure, REPORTS, at: 75 TRANS. MSBA no. 2 at 134 (1970); 77 TRANS. MSBA no. 1 at 45 (1972); 80 TRANS. MSBA no. 2 at 144-145 (1975); and 81 TRANS. MSBA no. 2 at 145-146 (1976). See also Commission on Judicial Reform, FINAL REPORT at 29-31 (1974). See also Ch. 551, Acts of 1975.

3/ MSBA Special Committee on Judicial Selection and Tenure, REPORT, at 77 TRANS. MSBA no. 1 at 49 (1972).

4/ Id. at 49-52.

5/ 9A MD. ANN. CODE (1957) (1976 Cum. Supp.) at 215. 01.01. 1974. 23 (12/18/74).

useful to review briefly the salient provisions of that order (a copy of which is attached as Appendix A).

THE EXECUTIVE ORDER OF DECEMBER 18, 1974

The 1974 Executive Order consolidates all provisions of the executive orders of July 6, 1970, July 17, 1970, and a minor amendatory order in a single document.[6/]

It establishes an Appellate Courts Judicial Nominating Commission and eight Trial Court Judicial Nominating Commissions, one for each judicial circuit. Each commission is of equal size,* consisting of 13 members - six lawyers, elected by members of the bar from other lawyers within the appropriate geographical area; six lay persons appointed by the Governor from within the same area, and a chairperson, who may be a lawyer or lay person, appointed by the Governor.[7/]

A vacancy in a chairmanship or laymembership is filled by gubernatorial appointment. A vacancy in lawyer membership is filled by majority vote of the remaining lawyer members of that commission.[8/]

The terms of the commissioners are co-extensive with the Governor's term. The State Court Administrator is ex officio the non-voting secretary of each commission.

The Court of Appeals is authorized to promulgate rules regarding the

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6/ Provisions designated by an asterisk (*) indicate recommendations proposed by the MSBA Special Committee in 1972; see Supra notes 3 and 4.

7/ At present, six chairmen are members of the bar (two of them retired judges), two are lay persons, and one chairmanship is vacant.

8/ Court of Appeals of Maryland, Order Adopting Appellate and Trial Court Judicial Selection Regulations, Janaury 6, 1975, par. 16. (Attached as Appendix B).

election of lawyer members, to be conducted under the supervision of the State Court Administrator. The Chief Judge of the Court of Appeals is authorized to promulgate rules governing commission procedures.

When a judicial vacancy occurs or is about to occur, the State Court Administrator notifies the appropriate commission. That commission proceeds to solicit applications and, on a confidential basis, to screen them. By secret written ballot, it selects at least a minimum number of names (a maximum is also specified). Under some circumstances, the normal minimum may be reduced.* Each person nominated must be "legally and fully professionally qualified, and must be chosen by secret written ballot* by a majority of the full authorized membership of the commission.* Names of the nominees, listed in alphabetical order, must be submitted to the Governor in writing* within 70 days of the first notification from the State Court Administrator. Names of nominees are released to the public concurrently with the commission's written report to the Governor.*

The Governor is bound to fill the vacancy from the names submitted to him by the commission.

MATTERS OF CONCERN - STUDY OF COMMISSION OPERATIONS - RECOMMENDATIONS

Because the administrative aspects of commission activity are presently handled largely through the State Court Administrator, it is now possible to assemble some data reflecting the work of the commissions.

During fiscal 1976, for example, 19 judicial vacancies both occurred and were filled.[9/] Six of the vacancies were in the District Court; 12 in the circuit courts/Supreme Bench, and one in the Court of Appeals.

9/ During fiscal 1976, some other vacancies occurred, but were not filled, and during the same period, some vacancies that had occurred previously were filled. For the purposes of the statistics contained in this report, we consider only positions that became vacant and were filled by qualification of a new judge between June 30, 1975 and July 1, 1976, unless otherwise stated.

Vacancies occurred in every judicial circuit except the Fourth, so all but one of the nine commissions met at least once during this period. In point of fact, one commission (the Seventh Circuit) met four times during the period.

With respect to these 19 vacancies, the commissions considered 162 applications (72 for the District Court; 80 for the circuit courts/Supreme Bench; ten for the appellate courts) and submitted 64 names to the Governor (22 for the District Court; 37 for the circuit courts/Supreme Bench; five for the appellate courts).

During fiscal 1976, the Governor's office expended $7,988.18 on behalf of the nominating commissions (the $5,871.76 spent on advertising vacancies represents the bulk of this cost).[10/] The Administrative Office of the Courts has kept no separate account of its expenditures, as they largely represent time expended by the State Court Administrator and his secretary. Additional expenses have also accrued because of postage, telephone, and photocopying. In addition, the election of lawyer members in early 1975 (fiscal 1975) cost some $5,000. Pro-rating this over the four-year elected term period, and considering the identified FY 1976 expenses, it would appear that the nominating commission operation costs the State approximately $12,000 per year. Obviously, this figure would be greatly increased if allowance were made for the time and efforts contributed by the unpaid commission members.

The importance of the task of the nominating commissions, their heavy workload, and the substantial expenditures for their operations would, of themselves, suggest the need for continuing study and possible improvement of commission operations. In addition, three other elements are relevant here:

1. The 1974 Executive Order authorized the Chief Judge of the Court

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10/ Letter from Hans F. Mayer, Administrative Office, Office of the Governor, to State Court Administrator, July 6, 1976.

of Appeals to issue rules governing commission procedures. Chief Judge Murphy did so on March 1 and June 19, 1975 (Appendix C). The rules were intentionally non-comprehensive, because the Chief Judge wanted an opportunity to observe commission operations before attempting more extensive procedural rule-making.

2. Senate Resolution No. 76 of 1975 (Appendix D), introduced by Senator Schweinhaut, of Montgomery County, urged the Chief Judge to adopt rules to require (1) publication of the name of each person applying to a commission and (2) granting of a personal interview to each applicant. Again, it was thought desirable to gain some feel of commission operations before responding to this suggestion.

3. In his inaugural address in June 1975, former MSBA President Wilbur D. Preston, Jr. remarked that the "Judicial Selection Commission system initiated by Governor Mandel is a step in the right direction." But he made two suggestions which he thought could improve the commissions: (a) election of chairpersons by commission members, instead of gubernatorial appointment; and (b) restructuring of the commissions to provide a majority of lawyer members on each." 11/

In an effort to solicit the view of commission members on these and other matters, the State Court Administrator, on August 11, 1975, mailed a 17-page questionnaire to all 117 commission members.12/ About 70 questionnaires (59.8%) were returned - an exceptionally high response in view of the complex and lengthy nature of the document. The commission members are to be commended on the time and thoughtfulness expended in answering this questionnaire.

11/ 80 TRANS. MSBA no. 3 at 237, 241 (1975).

12/ The earlier bar association questionnaire was mailed only to commission chairpersons, eight of whom responded. However, most, if not all, of the chairpersons consulted with some or all of their members before responding; 77 TRANS. MSBA no. 1 at 49 (1972).

During the fall of 1975 and winter of 1976, the responses were tabulated and analyzed. 13/ The questionnaire, including a tabulation of results, is attached as Appendix E.

The following discussion is focused on the questionnaire responses. It is divided into four parts:

I. Structure of Nominating Commissions.

II. Commission Procedures.

III. Personal Data Questionnaires (Applications).

IV. General Problems.

I. STRUCTURE OF NOMINATING COMMISSIONS.

A. Selection of Chairperson.

One of the suggestions made by President Preston was that the chairperson should be elected by commission members, rather than appointed by the Governor. The argument is that since the Governor appoints the six lay members, his appointment of a seventh member gives him at least apparent control of the commission, since he appoints enough people to deliver the seven votes required to nominate. In addition, the mere possibility that the Governor is able to control the important position of chairperson further enhances the appearance of potential gubernatorial domination. As one lawyer respondent put it:

> The experience of this writer has been that lay members of the commission are greatly influenced by the lawyer members. If a lawyer member is also the Chairman of the Commission (as is assumed the case in most instances) the opportunity for the influence appears to be even more apparent so that from the standpoint of attempting to maintain an unbiased forum it would seem that the less the Governor will have to say regarding the makeup of the commission the more autonomous it would be.

13/ This work was capably and efficiently carried out by Ms. Maria Kendro and Ms. Amy Scherr, both of whom were then students at the University of Maryland School of Law. Their intelligent and diligent assistance contributed materially to the success of this enterprise.

> I would think that if chairpersons are elected by the Commission members, the selection will be of the person found by the members to be the most qualified and even if the chairperson happens to be a lawyer member, any criticism that could possibly be made with respect to "handpicking the leadership" can be substantially negated.

On the other hand, a lay respondent contended:

> The chairman normally wields a leavening influence between two conflicting groups - the laymen who want parity and the lawyers who wish to dominate, as witness the inclusion of an ex officio as a possibility who would be a judge or a bar association official. The area of compromise in selection is narrow. The Governor, who has the final responsibility for appointment, ought to bear the responsibility of his selection. This onus should not be removed.

The questionnaire produced 34 votes in favor of gubernatorial appointment (21 lay and 13 lawyer) as opposed to 28 votes for commission election (8 lay and 20 lawyer). Thus, while lawyer respondents favored election and laymember appointment, the overall response favored continuing the appointive system. Only a handful of respondents (seven in all) favored such alternatives as a judge, bar association officer, or some other person serving ex officio as chairman.

In the earlier bar association poll, the response was overwhelmingly in favor of appointment of the chairperson by the Governor.

Other states have varying methods of chairperson selection, to the extent that process is revealed by readily available data. Only in Florida does it clearly appear that commission members elect the chairperson. In Nebraska, New York, and Pennsylvania, the chairperson is appointed, as in Maryland, by the Governor. In Kansas, the chairperson is a lawyer elected by the lawyers of the State. In many states, the chairperson is either a judge serving ex officio or an appointee of the chief judge of the State.[14/]

14/ DUNN, supra note 2, Appendix V.

From this data, it may be gleaned that most states have attempted to adopt some chairperson-selection mechanism not directly in the hands of the Governor. On the other hand, only one State can be plainly identified as utilizing commission election for this purpose.

As a practical matter, this problem is related to the problem of appropriate composition of the commissions themselves.

Under the present system, the chairperson position may be utilized by the Governor to provide additional lay representation on some commissions, so that, theoretically, all commissions are not potentially controlled by lawyers. Should one recommend an elected chairperson, it would be necessary to reconsider commission make-up. For example, should the commission make-up be six and six, with a chairperson to be elected from these? If so, would there be a real danger of deadlock? If the make-up should be an odd-number, should the extra person be a lawyer or layperson? Whichever the choice, would not this tend to assure election of a member of the class to which the extra person belongs?

Of course, an ex officio chairman or one appointed by some person other than the governor (e.g. the Chief Judge or the President of the MSBA) would avoid some of the difficulties. This is the approach used by several states, although the Maryland commission members seem to have little enthusiasm for it.

For example, the chairperson of the Appellate Courts Commission could be the Chief Judge of the Court of Appeals, ex officio, and each Trial Court Commission could be chaired by the circuit administrative judge of the appropriate circuit. This would lessen the appearance of gubernatorial control and avoid "politicking" within the commissions, which might occur if they elect their own chairpersons.

The chairperson could be given a vote only in case of a tie, or could be given general voting powers; both approaches are followed in other states.

This approach could also be varied by authorizing the Chief Judge of the Court of Appeals to appoint a chairperson from among specified groups of judges (or without categorical limitations).

The writer's observation of commission activities since March 1975 has disclosed no evidence of abuse of the chairperson arrangement, and the independence of the chairperson has been made apparent in a number of cases. But it must be conceded that the appearance of potential gubernatorial domination exists under the present system.

Agenda Proposal: That gubernatorial appointment of the chairperson be retained, unless there are basic changes in general commission make-up.

Alternative Proposal: That the use of an ex officio chairperson, or chairpersons appointed by the Chief Judge of the Court of Appeals, be instituted by amendments to the 1974 Executive Order.

B. Commission Membership.

Maryland State Bar Association President Preston's second suggestion was that each commission should contain a majority of lawyer members. He took this position because he thought "lawyers are uniquely qualified to decide who among them is best suited for the Bench."[15/]

This position has been adopted only by Arizona and the District of Columbia, although in a number of other states the same result may be reached because the chairperson (whether ex officio or appointed) is a judge. On the other hand, in Colorado, Florida, Massachusetts, Montana, Nebraska, Oklahoma, South Carolina, Tennessee, Vermont, and Utah, there is either express provision for a majority of laymembers, or the possibility that such a majority may be achieved by the appointive or elective process.[16/]

15/ 80 TRANS. MSBA no. 3 at 237, 241 (1975)

16/ DUNN, supra note 2, Appendix V.

Thirty-eight respondents to the 1975 questionnaire favored maintaining equality of lay and lawyer membership (23 lay and 15 lawyer). Twenty-five supported a majority of lawyers (three lay and one lawyer). Two respondents (one lay and one lawyer) backed a majority of lay members. Thus, as in the case of selection of the chairperson, there is a substantial split between lawyer and lay members, with the overall view being in favor of retention of the present system.

One lawyer respondent supporting exclusive lawyer membership stated the problem in terms of politics:

> I sincerely believe that the nominating commissions should be comprised of only attorneys who are elected by their fellow practitioners. The existing method of having the Governor appoint lay members is completely unacceptable in that the political aspect remains. In its present form the commissions have been severely criticized for placing names on their lists which were only put there through direct political pressure applied on various lay members.

But most of those advocating increased lawyer membership did so in terms like those of Mr. Preston: that is, on the ground that lawyers are better qualified to select potential judges.

This is a dubious proposition. While lawyers are clearly better able to evaluate the professional proficiency of a candidate for judicial office, and may be more aware of his reputation in the profession, intelligent lay people can make valid judgments in such areas as demeanor, general standing in the community, and sensitivity to community needs and concerns.

Moreover, although the 1971 Bar Association questionnaire rejected strongly the view that lawyer members "dominate" the commissions, observation of commissions "in action" suggests that the lawyers often tend to exercise an influence disproportionate to their numbers, because of their ability to speak with apparent authority as to the professional competence or incompetence of a candidate.

Finally, it seems important as a matter of policy that the commissions include meaningful representation from a community broader than that of the bar. It is easy for lawyers to forget that judges exist to serve the public, not just the bar, in the administration of justice. Thus, it is appropriate that there be participation by public representatives in the important initial nomination phase of judicial selection.

On the general topic of commission composition, the questionnaire asked if ex officio membership (judge, law school dean, university president) would be desirable. As indicated above,[16A/] other states occasionally provide such a scheme, often by having an ex officio chairperson.

There was somewhat greater interest in the concept of ex officio memberships than in the concept of an ex officio chairperson. A total of 20 respondents (12 lay and 8 lawyer) backed, in varying degrees, the notion of a judge, a law school dean, an academician, or some other ex officio member.

On balance, with the possible exception of a judicial member,[16B/] ex officio memberships would not seem desirable. However, not unlike the use of a judge as chairperson, this raises the possibility of judicial domination of commissions, or at least the exercise of very strong influence. Only six respondents (four lay and two lawyer) favored judicial ex officio members.

A final question in the commission composition area dealt with the desirability of formal requirements for bi-partisan political membership. This approach was rejected 35 - 14, with both lawyers and laymembers voting strongly in the negative.

These views of the respondents are supported by observation of commission meetings. Rarely is there any discussion regarding the party affiliation of a

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16A/ See p. 7, supra.

16B/ For a discussion of judicial members, see p. 10, supra.

candidate. Indeed, in most instances, that affiliation is probably unknown to most commission members.

Agenda Proposal: That commission composition remain unchanged.

C. Election of Lawyer Members.

The 1970 election for lawyer members cost $8,000 and the 1975 election about $5,000. The difference in costs suggests a possible lack of effectiveness in the process. The lower 1975 figure reflects the fact that contested elections took place in only two of the six appellate judicial circuits and three of the eight judicial circuits.

Nationally, ten states (in addition to Maryland) provide for lawyer election of all or a substantial number of lawyer-commissioners.[17] In the remaining nominating commission states, lawyers are designated by varying methods, including judicial appointment, gubernatorial appointment, and bar association appointment.[18]

Twenty-one 1975 respondents (13 lay and 8 lawyer) opposed retaining election of lawyer members. One lawyer opponent said:

> Although no expense is too great to assure good appointments to the Bench, I believe as good or better results can be achieved both with respect to judicial appointments and commission appointments by handling appointments to the commission through the local Bar Association. Appointment by local Bar Associations is probably very workable in the small local associations. In Montgomery and Prince George's Counties, etc., such a procedure could be expensive if competitive, but it would seem that if expense is a concern, it can best be handled locally rather than as a State-wide expense.

A lay opponent argued:

> It is ludicrous to have a Merit Selection Plan and then require a successful candidate to undergo the election process with the uncertain potential and necessary involvement in campaign activities.

17/ Alabama, Indiana, Iowa, Kansas, Missouri, Nebraska, Oklahoma, Tennessee, Vermont, and Wyoming.

18/ DUNN, supra note 2, Appendix V.

> Attorney members should be recommended by a panel of judges of the Court of Appeals and intermediate Court of Appeals. Final selection should be with the approval of the Chief Judge. Attorneys should be volunteers; however, the final selection should not be left to the Bar Association, since not every attorney who may volunteer is suitable or capable for this position of concern.
>
> The local bar association already makes its input into the nominating process -- the Governor appoints lay members. The power of a nominating commission is properly diluted by dividing the appointing authorities. Further, attorneys recommended by a bar association, which then submits a list of recommended candidates, have a double-edge and too much power in the final process.

However, 35 respondents (2[illegible] of them lawyers) supported the election concept, arguing that it reduced official bar association, judicial, or gubernatorial domination, thus tending to increase commission independence.[19] A lawyer said:

> The answer to non-use of the democratic process is to encourage greater use, not to eliminate the process. The cost is insignificant compared to the importance of the task.
>
> If the commission owed its existence to law, rather than executive order; if there were a permanent administrative structure guiding the commission; and if its work were given greater attention in Bar Association publications, then, perhaps, more lawyers would be encouraged to participate.

There are, therefore, persuasive reasons for retaining the election process, and it is apparently used successfully in many other jurisdictions.

Agenda Proposal: That the lawyer-election process be retained. However, non-use of this process to the extent this occurred in 1975 tends to subvert its purposes, and to convert lawyer selection to an appointee system; the Court of Appeals designates lawyer members if there are no candidates in a given geographical area.[20] If increasing non-use occurs in future elections, it might

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19/ It should be kept in mind that any member of the Maryland Bar in good standing and with the requisite residence may become a candidate for commission membership. He need not be a member of MSBA or any other bar association.

20/ Appellate and Trial Court Judicial Selection Regulations of Jan. 6, 1976, par. 18.

be well to reconsider this system.

D. Eligibility Requirements - Residence.

1. Lay members.

Under the 1974 Executive Order, a lay member of the Appellate Courts Commission must be a resident of and registered voter in one of the six appellate judicial circuits; one lay member must be appointed from each of these six circuits.

A lay member of a trial court commission must be a resident of and registered voter in the judicial circuit served by that commission. In addition, if there is more than one county in the circuit, at least one person from each county must be appointed to and must reside and vote in that county.

Respondents voted 48 - 8 against any change in these requirements, with both lawyers and laymembers strongly opposing any change. This is consistent with the response to a rather similar question in the 1971 questionnaire.

2. Lawyer members.

The situation is somewhat more complicated in the case of lawyer members. The Executive Order requires one lawyer member to be elected "by the members of the Maryland Bar in each of the six Appellate Judicial Circuits." Under the January 6, 1975 Appellate and Trial Court Judicial Selection Regulations, adopted by the Court of Appeals, a lawyer is eligible to run for appellate commission membership if he either resides or maintains his office in the appellate judicial circuit he seeks to represent, and a lawyer who either resides or maintains an office in the appellate circuit may vote for candidates of that circuit, but no person may vote in or represent more than one appellate circuit. 21/

21/ Appellate and Trial Court Judicial Selection Regulations of January 6, 1975, pars. 1-4.

With respect to the trial court commissions, the Executive Order provides that a lawyer member must reside in and be a registered voter of the circuit he represents, and be elected "by the members of the Maryland Bar who reside and are registered voters in the Circuit."

The Appellate and Trial Court Judicial Selection Regulations allow a lawyer to vote for all lawyer candidates for the commission from the circuit in which the lawyer resides and maintains his principal office. [22/] Thus, there is a facial inconsistency between the Executive Order and the Selection Regulations. The 1974 Executive Order (which is clearly more specific than the 1970 Orders) permits the conclusion that mere residence and voter registration is sufficient, whereas the Regulations require a principal office in the circuit.

At the trial court commission level, there is no mandate for at least one lawyer member from each county in the circuit. If, for example, there are no lawyer candidates from a given county, the Court of Appeals may fill that position by appointment, without regard to any residence consideration, except on a circuit basis.[23/]

Thus, while lay residential eligibility requirements create no problem, several are created by the lawyer requirements. The first relates to the residence/office provisions, and is illustrated by the following factual hypothesis:

Baltimore City constitutes the Eighth Judicial Circuit. Baltimore County is part of the Third Judicial Circuit. It is not unusual for a lawyer to reside in Baltimore County, but to conduct most of his practice in the City. If this lawyer is registered to vote in the county, he is apparently not eligible for

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22/ Id. at par. 8-10.

23/ Id. at par. 18.

election to any trial court commission, since the Executive Order requires residence and registration in the circuit as a condition of eligibility, but the Regulations require principal office in the circuit.

Translating this example to the appellate level (Baltimore City and Baltimore County are also in different appellate judicial circuits), we find quite a different result. Since an appellate court commission lawyer member is eligible in either the appellate judicial circuit in which he resides or in which he maintains his office, he may stand for election in either one of two circuits, but not in both.

The reasons for the difference between the two types of commissions derive from the 1970 Executive Orders and the election regulations adopted pursuant to them. The concept at that time was one of deliberately broader eligibility for appellate court commission lawyer members, in part because the appellate courts were thought of as State-wide courts.[24/]

However, there is obviously some dissatisfaction with present arrangements. Twenty-two respondents favored a change in the lawyer eligibility provisions (10 lay, 12 lawyer), with 42 opposing a change (18 lay, 24 lawyer). The vote against change may well be derived from the fact that the residence/office problem is really concentrated in only two areas: Baltimore City and Baltimore County. It is probably not a major problem anywhere else in the State.

One purpose of geographical eligibility requirements is to help to assure that commission members are likely to have some knowledge of the communities, the courts, and the candidates for judicial office in that geographical area. In a location like the Baltimore metropolitan area, a mere residence requirement for lawyer members does not necessarily produce this result. A principal office

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24/ Minutes of Court of Appeals Standing Committee on Rules of Practice and Procedure, July 24, 1970.

requirement might be more effective in this regard. Since an increasing number of law firms maintain more than one office, a mere "office" requirement (as opposed to "principal"office) might produce too much potential mobility.

On the other hand, some of the flexibility permitted for the appellate courts commission does not seem unreasonable.

Since we are dealing with an elective process, the voters have some leeway to reject any candidate they believe to be insufficiently familiar with the community or with the potential judicial candidates.

But the "residence plus principal office" requirement for trial court commission members also has its values. It means that the lawyer member will greater contact with the community the judge is to serve, above and beyond the "9:00 to 5:00" contacts of the working day. This community contact, and the public's awareness of it, may be significant factors in public support of the commissions. Similar reasons probably underlie the requirement that judges reside in the communities from which they are appointed or elected; Md. Const., Art. IV, §2.

Even though imposition of a "residence plus principal office" requirement means the exclusion of some capable lawyers from trial court commissions, its benefits seem to outweigh its disadvantages, especially at the trial court commission level.

Agenda Proposal: That there be no change in the 1974 Executive Order's geographical eligibility requirements for lawyer members of appellate or trial court commissions; with respect to trial court commissions and to both voter eligibility and eligibility to serve, that both the 1974 Executive Order and the Selection Regulations (Par. 9 and 10) be amended to require explicitly both residence and principal office within the circuit.

The remaining lawyer residence eligibility problem has to do with appointment within counties in a judicial circuit. This problem exists only at the trial court commission level.

The Selection Regulations do require that there be at least one lawyer member from each county within the circuit for which there is a nominee. But if there is no nominee from a given county, the Court of Appeals may fill the vacancy by appointment, without any restriction as to geographical location, except that the lawyer must be from within the circuit.[25/]

It is recognized that in some counties, the number of lawyers is so small as to present the real possibility of no lawyer willing and able to serve.[26/] However, the desirability of trying to obtain at least one lawyer member per county is great.

The 1975 respondents voted 45 (20 lay, 25 lawyer) to 16 (5 lay, 11 lawyer) in favor of the concept of at least one lawyer member per county.

Agenda Proposal: That the Selection Regulations be amended to require that if there is no nominee from any county in a circuit, the Court fill the vacancy on a trial court commission by appointing a lawyer from that county, if practicable.

E. Eligibility Requirements - Disqualifications.

The 1974 Executive Order disqualifies from appointment any lay person who is an elected State official or full-time employee of the State. The Court of Appeals Selection Regulations disqualify any lawyer who is an elected governmental official, or a full-time federal, State, or municipal officer or employee.

The appearance of independence on the part of a commission may be undermined if it includes any substantial number of public employees. Extraneous political considerations may be apprehended if elected public officials are members. Undoubtedly in recognition of those principles, 13 of the 23 nominating commission

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25/ Appellate and Trial Court Judicial Selection Regulations, January 6, 1975, pars. 8, 13, 14, and 18.

26/ This may be particularly so because the Executive Order makes a lawyer member not eligible for judicial appointment during the term for which he was chosen to serve on the commission.

states (other than Maryland) include some prohibition against the holding of public office by a commission member.[27/]

The Maryland commission members agree with this view. By vote of 60 to 5, they favored uniform restrictions for both lawyer and lay members. By substantial votes both lawyer and lay commissioners supported prohibitions against commission service by any of the following:

elected State officials,
full-time State employees,
elected government officials,
full-time federal employees,
full-time county employees, or
full-time municipal employees.

Agenda Proposal: That the 1974 Executive Order and the Selection Regulations be amended to provide uniform disqualifications making ineligible for commission membership:

Any elected public official (federal, state, county, or municipal), and any employee in the office or department of such an official, whether full-time or part-time.

Any full-time government employee (federal, state, county, or municipal).

Any appointed public official (federal, state, county, or municipal) who receives compensation for his public duties, and any employee in the office or department of such an official, whether full-time or part-time.

To avoid any misunderstandings, it might be best to list specifically all of these disqualifications for both lawyer and lay members, in the Executive Order itself.

27/ DUNN, supra note 2, Appendix V.

II. COMMISSION PROCEDURES

A. Announcement of Vacancies.

At present, when a vacancy occurs, a paid notice is inserted in the Daily Record, a newspaper having general circulation in the legal community throughout the State. These notices are usually run three times in each of two consecutive weeks with one final insertion in the third week. The Daily Record frequently runs the notices several additional times without charge, so there are usually more than seven insertions. The Eighth Circuit Commission runs its notices for at least three consecutive weeks.

The notices indicate the court in which the vacancy exists, the commission responsible for proposing names to the Governor, and the procedure and time limits for making application. The names of all commissioners are listed, and those knowing of qualified applicants, in addition to those wishing to apply, are urged to contact commission members or the State Court Administrator. A typical notice is attached as Appendix F.

Copies of the published notice are sent to the members of the appropriate commission, to the chairman of the MSBA Standing Committee on State Judicial Appointments, and to the corresponding committee chairperson or bar association president in Baltimore City or the county in which the vacancy exists. In the case of vacancies occurring in Baltimore City or Baltimore County, notices are usually sent to both local associations. With respect to a city vacancy or an appellate court vacancy, notices are also sent to such groups as the Women's Bar Association and the Monumental City Bar Association. For appellate vacancies, notice is also sent to local bar associations in every county within the appellate judicial circuit.

Occasionally, the press publishes news of a vacancy (e.g., when there is a death in office, or when a particularly newsworthy judge retires). Generally, however, with the exception of some local papers, efforts to publicize vacancies

in the press have met with little success.

Of course, there is considerable word-of-mouth notice of vacancies.[28/]

Questionnaire respondents recognized the importance of wide-spread notice of vacancies. One of them said:

> I feel that maximum exposure of the vacancy is desirable and that it would not be inappropriate to give notices to all newspapers of general circulation in the jurisdiction affected and, perhaps by announcements over the radio and telephone stations.

However, 55 respondents found the present procedures adequate (24 lay, 31 lawyer) as opposed to nine who disagreed (2 lay, 7 lawyer). It is noteworthy, too, that in a later question regarding factors that deter applicants, only three commissioners (1 lay, 2 lawyer) mentioned inadequate notice as such a factor.

The writer's personal observations of commission operations supports the majority of respondents. There is virtually no evidence that qualified persons have failed to apply because of lack of knowledge of a vacancy, although some cases of tardy filing (usually due to lawyer-procrastination, not to lack of notice) have occurred.

Agenda Proposal: That there be no change in notice procedures. If press releases are to be utilized, they should be handled locally by a commission chairperson or member who has access to the local press.

B. Recruiting.

At the time of the 1975 questionnaire, commission procedures regarding recruiting differed markedly. Some commissions did nothing to recruit; others, at least informally, conducted rather intensive recruiting efforts.

28/ Some argue that paid advertising of a judicial vacancy is demeaning or undignified because it is like a "want ad". However, given the major newspapers' lack of interest in prominent handling of news about vacancies, the advertising procedure seems much more likely to accomplish the desired objectives.

The questionnaire respondents supported recruiting quite strongly: 47 (22 lay, 25 lawyer) for as opposed to 22 (7 lay, 15 lawyer) against. This response is substantially more favorable to recruiting than was the 1971 questionnaire (four to four), although the differences between the two sets of answers may lie more in the realm of semantics than substance. This may also be true, at least partially, with respect to the 1975 proponents and opponents.

For instance, an opponent thought that:

> A possible judicial candidate should not be recruited in that recruiting as in anything else is subject to abuse.

On the other hand, a spokesperson for the majority wrote:

> The time and effort needed to recruit potential applicants is a guiding factor in this question. A formal effort requires the getting together of a group which cannot always be arranged because of time commitments. Since recruiting, in some instances, has been successful on an individual basis, I would recommend this as the most desirable as opposed to a formal recruiting procedure.

The real difference, perhaps, is between concepts of formal and informal recruiting. Formal recruiting involves the notion of official commission determination about who should be recruited, and official approaches to the potential recruits. This produces a real danger of pre-judgment and pre-commitment, thus potentially subverting the commission evaluation process.

Informal recruiting simply is the process whereby individual commission members contact persons they believe to be qualified and urge them to submit their names. So long as it is made clear that there is no commitment to the "recruit," and that the recruiting procedure in no way guarantees that he will be on the list, this process seems a most desirable way of attempting to produce good candidates.

This difference was clearly recognized by the 1975 respondents. Only 16

(7 lay, 9 lawyer) voted for formal recruiting, while 38 (16 lay, 22 lawyer) supported informal recruiting.

Agenda Proposal: That informal recruiting be encouraged. No change in the Executive Order of any other document is required. Paragraph 6(b) of the 1974 Executive Order presently urges the commissioners to "seek ... applications of proposed nominees ...."[28A/]

C. Number of Nominees.

The 1974 Executive Order, with respect to trial court commissions, requires a commission to submit a minimum of two to five names for each vacancy, depending upon the number of lawyers currently contributing to the Clients' Security Trust Fund in the judicial circuit in question. There are rather liberal provisions permitting submission of fewer names under various circumstances, although a single name cannot be submitted without the Governor's consent.

The use of the judicial circuit as a measuring area is probably a typographical error. The July 17, 1970 Executive Order establishing the original trial court commissions utilized the number of lawyers in the county in which the vacancy existed. This is more realistic, since in a circuit with a large county and several smaller ones, the highest minimum might be requried for any vacancy in the circuit - even a vacancy in a county with only a handful of lawyers.

The 1975 respondents favored the "county" standard as against the "circuit" standard by 35 (9 lay, 26 lawyer) to 27 (18 lay, 9 lawyer). The differences between lay and lawyer responses to this question may well lie in the failure of some lay commissioners to recognize that a trial court vacancy must be filled from a given county, and that in some counties there are not very many lawyers.

28A/ For a related matter dealing with "banking" names of qualified people, see p. 49.

In commenting on this issue, some respondents discussed the importance of nominating only the best-qualified lawyers, and thus feeling free to go below the normal minimum if there are not enough fully qualified lawyers among the applicants. One expressed his views this way:

> The Executive Order should provide that a list submitted by a particular commission should have a minimum of two candidates only if a majority of the commission members feel that there are two or more candidates who are "legally and most fully professionally qualified". It should further provide that if a majority of the commission members feel that there are either no or only one "legally and most professionally qualified" applicants, a confidential report to that effect should be submitted to the Governor and that he, the chief judge of the Court of Appeals, and the particular commission chairman thereafter agree upon a further course of action. I can well envision a situation, even in Baltimore City, where none or only one of the applicants would meet the test of the Executive Order, but I do not feel that a commission should be given the right to submit only one name lest it become the appointing authority.

The 1975 respondents favored changes in the minimum requirements, by 35 (22 lay, 13 lawyer) to 31 (19 lay, 22 lawyer). Some lawyers thought that less flexibility would reduce political problems.

The 1971 questionnaire responses also showed substantial sentiment for authority to drop below the normal minimum, at least within some limits. And, of course, the 1974 Executive Order permits this. In point of fact, of the 19 vacancies that have occurred and were filled during Fiscal 1976, lists with less than the normal minimum number of names (using the county standard) were submitted in 13 cases. In only two of these cases was a single name submitted; in both instances this occurred in small counties with very small lawyer populations.

Agenda Proposal: That the 1974 Executive Order be amended to reflect a "county" rather than a "circuit" standard for determining normal minimum number of nominees for trial court vacancies. The provisions permitting submission of fewer names than the normal minimum should be retained.

A related issue involves the limit on maximum number of names, which is presently seven for each vacancy, whether on a trial court or on an appellate court.

The obvious purpose of such a maximum is to assure that the commissions restrict their lists to the best available nominees, rather than leaving the lists open-ended. If the standard for nomination is in fact "legally and most fully professionally qualified," marginal applicants (even those "qualified" but not "most fully" qualified) should be eliminated. A maximum limitation tends to achieve this objective.

The 1975 respondents apparently agreed. Only nine (3 lay, 6 lawyer) vote for changes in the maxima, while 51 (24 lay, 27 lawyer) opposed any change.

Of those supporting change, some favored reducing the maximum to as low as three. However, this seems an unduly restrictive approach. Actually, the maximum number of names was not submitted in connection with any of the Fiscal 1976 vacancies, so formal changes to reduce the maximum limit would hardly seem necessary.

Agenda Proposal: That there be no change in maximum limits of names to be submitted for each vacancy.

D. Initial Screening and Voting.

Every commission faced with more than a handful of applicants utilizes some form of initial screening to eliminate candidates deemed totally unqualified. A common method is for the chairperson to read the list of candidates in alphabetical order. If no commission member indicates a desire to retain the name, it is eliminated. If any commissioner wishes to keep the name in, it is kept. This process is sometimes accompanied by discussion, and is occasionally repeated several times.

The next process is formal voting on those names remaining after screening. This is preceded by discussion of these persons, including consideration of bar association and other recommendations and comments.

Some commissions vote on one name at a time. Any name receiving at least seven votes is on the list. Others list on a single ballot all names remaining after screening and vote on these as a group. In such commissions, members are

sometimes directed to vote for three or five names (whatever the specified minimum list is); in others, they are directed to vote only for the persons deemed to be "legally and professionally most fully qualified". Various procedures are used if no one initially receives seven votes, or if an insufficient number of candidates are produced.

I postpone the issue of interviewing to a later stage (see H, pp. 40-44, infra) and also the problem of specific areas of information to be developed in the screening process. At this point, I should like to focus on the procedure itself. The following statements are a fair consensus of the comments submitted by the 1975 respondents:

A Baltimore City lawyer:

> I feel that there should be an initial screening process followed by a secret ballot at which time all who remain after the initial screening are voted upon. Only those who receive a majority vote or more votes on that ballot should be included on the list submitted to the Governor. There should then be no consideration of a person who failed to secure a majority of votes on the first ballot unless such be by a 3/4ths vote of the commission. The purpose of this is to prevent a second chance when a particular member's pet candidate fails to obtain a majority.

A second Baltimore City lawyer:

> Bearing in mind the need for full and candid discussion; the need for secret balloting; and the "leaks" from the commission; there should be no voting, by initial screening process or otherwise, except by secret ballot. I suggest that each applicant be discussed and then a vote taken by distributing a ballot with all of the applicants' names on it. Any applicant not obtaining sufficient votes could be reconsidered one time only upon the request of any commissioner.

A Baltimore City lay member:

> Provide for a fair initial elimination process within the commission. Then provide for a secret ballot, name by name, as individuals rather than the entire group. Should an applicant fail to obtain the minimum necessary number, at least one re-vote should be taken of those who receive the largest vote but fail to meet the majority requirement. For example, if seven votes were needed and two applicants received six votes each, the second vote should be taken on these two only. If, on the second effort, insufficient votes are obtained, then the chairman should close the voting and submit a letter of those selected, and advise the appointing authority accordingly.

A Suburban lawyer member:

> The best procedure is to screen the entire list of applicants, deleting from the list any applicant whose application is not supported by at least one member of the commission. The reduced list of applicants is then voted upon by secret ballot, with individual commission members voting for number of nominees whose names are to be submitted. In the event that there are not a sufficient number of nominees with a majority of votes, then those nominees with the smallest plurality should be deleted from the list and a second or successive votes taken until the requisite number of nominees with a majority is selected.

A Suburban lay member:

> A detailed questionnaire (samples submitted seem to cover the basic information). An investigative inquiry made by both the lay and law members of the commission if it applies to someone within the county they represent. A presentation by these persons to the commission. A round table discussion to determine if others of the commission have an awareness of the individual applicant, and a presentation of their knowledge and comments. The chairman's results of his investigative action. A ballot vote whether to retain on prospect list fully qualified. Final list voted by secret ballot.

A Rural lawyer member:

> Screening: I would suggest that some system be established to provide for an "initial review" of all applications for the purpose of determining from the commission members whether personal interviews of applicants are desirable and, under proper circumstances (for example, if the commission is permitted to solicit applications) to determine whether additional applicants are to be sought. This procedure could probably be handled by ballot through the mails. Once this is accomplished, then it would seem that the commission should be at liberty to conduct its usual meeting for the consideration of applicants, or applications.
>
> Voting: Voting should be handled on each candidate individually by secret ballot.
>
> I do believe that each candidate should be voted on separately. If too many candidates receive a majority vote then a separate vote can be taken to select the maximum number of five; if the minimum number of two do not receive a majority vote, then additional ballots will have to be taken until the minimum number does receive a majority - similar to a jury case.

It is suggested that proper and reasonably expeditious results can be achieved by a procedure involving discussion, in alphabetical order, of each name on the list, followed by a screening process in which any name is eliminated unless at least one member requests its retention. The remaining names would

then be voted upon by a single ballot, with each member voting only for each person he deems to be "legally and professionally most fully qualified." A requirement of voting for a minimum of three or five names tends to compel members to vote for some individuals merely to complete the requisite number, and not necessarily because of high qualifications.

Following this ballot, if no names have received at least seven votes, or if a majority of commissioners present think the list contains insufficient names, the commission might continue to ballot either with the names on the first ballot, or with a new ballot, dropping the names receiving the fewest number of votes. Reconsideration of a name eliminated on previous balloting should be permitted only by vote of three-quarters of the members present.

If the balloting produces a list containing more than the maximum number of names, either those receiving the smallest number of votes should be eliminated until the maximum is reached or there should be a re-balloting.

While proxy voting was not discussed by any respondent, it might be well to address it at this point.

Proxy voting may be of two types. First, the absent member may give another member a "blank" proxy, permitting the other member to case the absentee member's vote for any candidate the present member desires. This procedure is highly undesirable for nominating commission voting, since it eliminates the benefits of discussion so far as the absentee is concerned, and provides broad opportunity for maneuverings of various kinds. So far as the writer knows, this procedure has not been used in any commission.

Second, the absent member may instruct the chairperson or some other member to case the absentee's vote for one or more designated candidates. Or the absentee may simply mark a ballot form in advance. This procedure has been used on one commission.

This second procedure also seems undesirable, and possibly illegal. Once again, the absentee is deprived of the benefits of any discussion. Also, if the candidate(s) for whom the absentee is voting are screened out prior to the final ballot, the absentee's vote is wasted. Finally, this procedure is quite likely to violate the secret ballot requirement of the Executive Order.

Agenda Proposal: That each commission employ those screening and voting procedures with which it is most comfortable, provided:

1. That the secret written ballot requirement is adhered to on the final vote;

2. That members not be required to vote for any specified number of candidates; and

3. That proxy voting be expressly prohibited.

E. Disqualifications for close relationship.

What should be done if a commission member is related closely (whether personally or in a business or professional sense) to one of the applicants? Should he be permitted to participate in the discussion and vote if he reveals the relationship? (1) Should he be permitted to discuss and vote as to all applicants except the relative; or (2) should he be totally excluded from the meeting?

The first procedure permits other members to discount for any bias, but may inhibit free discussion, and it also allows a possibly less than impartial vote. Yet it does permit the member to give the benefit of views about other candidates.

The second procedure has the benefits and disadvantages of the first, except that the possibly biased vote is eliminated.

The third procedure minimizes inhibitions on full and frank discussion, and eliminates the biased vote, but does preclude the excluded member from voting altogether. It also deprives other members of the excluded member's

views as to non-related applicants.

In an attempt to balance these conflicting values, the Chief Judge of the Court of Appeals promulgated Rule 4A on June 19, 1975. It reads as follows:

> 4A.
> (a) A commission member may not attend or participate in any way in commission deliberations respecting a judicial appointment for which (1) a near relative of the commission member by blood or marriage, or (2) a law partner, associate, or employee of the commission member is a candidate.
>
> (b) For the purpose of this rule, "a near relative by blood or marriage" includes a connection by marriage, consanguinity, or affinity, within the third degree, counting down from a common ancestor to the more remote.

Although one commission has interpreted this rule as precluding participation in discussion and voting only as to the relation, it is in fact intended to preclude any participation in the meeting pertaining to the vacancy for which the relative is a candidate. It has been so applied by other commissions.

The 1975 respondents had varying views as to this rule. A Baltimore member said:

> (A) I think a commissioner should:
> a. Make the relationship known.
> b. Comment as he pleases.
> c. Absent himself from that part of the discussion pertaining to that applicant.
> d. Be able to vote as to that candidate. The only problem would be to inhibit discussion. Why deprive the applicant of a vote he might otherwise have received, the relationship aside? Also, it is conceivable that the commissioner would not vote for that applicant.

On the other hand, a rural lawyer opined:

> It is impossible to conduct meetings fairly if a relative of a candidate is present at all. I think that a person should not accept a position on a nominating commission if they anticipate a relative will seek a judgeship in their circuit during their term on the commission. Perhaps a member should be required to resign if a close relative submits his name as a candidate for judge. A relative is bound to learn of the discussions of the candidate and this might impair his objectivity in future meetings. If a vacancy is thus created, the Governor could appoint a layman to fill it and the Chief Judge of the Court of Appeals could appoint a lawyer.

The majority response is well summed up in the following remarks:

> A provision that a commission member should be excluded only from discussion of and voting on the candidate to whom he is related has more superficial appeal than the rule as written. But, it seems to me that the basic requirement should be that a commission member not be given any means whatsoever of furthering the candidacy of the applicant to whom he is closely related. Among the things he could do while participating in the meeting following his exclusion from discussion on the particular candidate are to be supercritical of other candidates and to single shoot. Moreover, the mechanics of permitting him to vote on all candidates except the one to whom he is closely related would be difficult, if not impossible.
>
> It seems to me that no hint of favoritism, bias, etc., should attach to the actions or decisions of the commission. The only way that can be accomplished is to exclude a commission member from the entire meeting during which a person closely related to him is to be considered.

In point of fact, 38 respondents (17 lay, 21 lawyer) voted to retain the rule as written. Nine (7 lay, 2 lawyer) thought the member should be excluded only for discussion and voting as to his relative. Five (2 lay, 3 lawyer) favored no exclusion if the relationship was fully revealed. Three (all lawyer) voted for some other approach. Thus, the vote in favor of Rule 4A stands at 38-18.

Agenda Proposal: That Rule 4A be retained in a form no less stringent than its present form.

An issue not raised by any respondent was whether the rule should be expanded. In its business aspects, it applies only to law partners, associates, or employees of the commission member. But lawyers may be involved in commercial ventures, and a candidate might be employed in such a venture with a lay member of the commission or even with a lawyer member.

This situation has arisen once since March 1, 1975. Should the rule be broadened to cover it?

Agenda Proposal: That Rule 4A be expanded to apply to close commercial relationships as well as to family and professional legal relationships.

F. Bar Association Recommendations.

Prior to the 1970 Executive Order, the main public source of recommendations for judicial appointments was the State and local bar associations. These associations prepared their recommendations through various procedures, ranging from elaborate polls to standing committees to open or closed meetings attended by those members of the association who chose to attend.

Both the 1970 Executive Order and the simple 1974 Order visualize continued recommendations from bar associations, but these recommendations now go to the appropriate commission instead of to the Governor.

As indicated earlier in this discussion, when a judicial vacancy occurs or is about to occur, the MSBA and other appropriate bar associations are advised. These associations are also furnished with the names of those who file applications with the commission. In the Eighth Circuit, the association also receives copies of each personal data questionnaire.

The MSBA has a Standing Committee on State Judicial Appointments. This consists of a chairman and general members from various parts of the State plus local members who deliberate with the committee when there is a vacancy from a particular circuit.

This committee rates the people it considers as "highly qualified," "qualified," "not qualified," or "insufficient information." It so reports this to the appropriate nominating commission. The report lists the members of the committee who were present for the vote and the result of the vote on each candidate (by number of ayes, nays, and absentions, not by name).

Some local associations take polls of their members as to candidates, and report the full results to the appropriate commission. Others poll, but report only a summary of results (e.g., specified people received affirmative support from at least 70 percent of the poll respondents).

Still others utilize membership meetings or some form of committee action. In most of these cases, the report of the commission will simply list several

names as "qualified" with further elaborations.

Virtually all commissions use the bar association recommendations. This is generally done by reading the bar reports either at the outset of the meeting or just before voting, or by mentioning, during screening, that a particular person has or has not been recommended.

Some commissions have expressed concern about the value of bar association reports, suggesting that committees may lack local perspective (especially the MSBA) or that local association polls may be mere popularity contests. Nevertheless, substantial numbers of commissioners thought that the bar association recommendations were helpful. Thus, a conclusion was reached by vote of 44 (19 lay, 25 lawyer) to 22 (7 lay, 15 lawyer) in favor of MSBA recommendations and by vote of 41 (18 lay, 23 lawyer) to 24 (8 lay, 16 lawyer) for local bar recommendations.

It is, perhaps, not surprising to see the lay members finding greater value in bar recommendations than the lawyers (note the proportion of lay "ayes" to "nays" was approximately 3 - 1 for candidates supported by both MSBA and local bars - much stronger than the lawyers). It is surprising to note relatively less support for the local bars than the MSBA, since a number of those who submitted comments (both lay and lawyer respondents) thought that "lawyers from the respective circuits are more aware ... as to who among them are the most qualified candidates."

This general acceptance of the concept of bar recommendations does not necessarily denote satisfaction with present procedures. Indeed, there were a number of comments to the effect that the bar reports should give reasons for particular ratings, list sources of information, or, at the least, state criteria for such classifications as "highly qualified" or "qualified" and explain why a particular person was given a particular rating.

Other commentators wanted all bar associations to use the State Bar rating system, while still others were interested in learning of the procedures used by each bar group.

The comments reveal some commission scepticism with respect to bar politics and popularity contests, and a consequent concern with receiving something more than the ultimate conclusions reached by the bar groups. On the other hand, by asking for criteria, ratings, and reasons, the commission members are requesting information they themselves are not required to furnish the Governor (and would possibly find it very hard to furnish if so required).

It may be that the resolution of this problem lies in assisting commission members to decide how much weight to give bar association recommendations. Recommendations prepared pursuant to commission guidelines could be given more weight in deliherations by commission members.

Agenda Proposal: That any bar group making recommendations to a commission be requested to adhere to the following guidelines:

1. If the recommendation is based on a poll of bar members, the report to the commission should reveal all questions asked in the poll, and the number of responses (affirmative, negative, or non-response) if applicable, to each question. The report should also show the number of people polled and the number of respondents.

2. If the recommendation is in the form of a committee report or based on a vote of a bar association meeting, it should rate each candidate as "highly qualified," "qualified," "unqualified," or "insufficient information." Criteria for each category should be established. If a committee is involved, the names of the persons attending the meeting should be listed. If an association is involved, the number of persons attending the meeting and the total number of members of the association should be stated. A quorum should be established including a "local" quorum in the case of groups, like the MSBA, having both "general" and "local" members. In either case, the votes for each

candidate in each category should be listed by "yea," "nay," and "absention."

Another issue dealing with bar participation is whether personal data questionnaires should be released to bar associations or bar committees. The questionnaires are confidential, in order to induce the fullest disclosure to the commissions. They are released to the MSBA and Baltimore City Bar Associations pursuant to a special waiver. They are occasionally furnished the Governor after the commission list has been submitted.

Although release to a full bar association would be tantamount to release to the general public, release to a responsible bar association committee of rather small size, whose chairperson could be held responsible for leaks, might prove beneficial.

Agenda Proposal: That all commissions provide for release of personal data questionnaires to the MSBA committee, the Bar Association of Baltimore City committee, and any similar standing committee of an established bar association.

Questionnaires of those on a commission list should also be furnished the Governor when the list is submitted.

G. Confidentiality of Names of Applicants.

As the preceding discussion has indicated, names of those applying for judicial appointments are kept confidential except that the names are routinely furnished appropriate bar groups, and the list of commission nominees becomes public when it goes to the Governor.

SR 76 of 1975 urges that each commission publicize the names of every applicant, both in order to permit public comment and to reduce the likelihood of secret and subversive maneuvering within the commissions.

This was an area of real controversy among the 1975 respondents. The most prevalent argument against public disclosure was that it would discourage qualified applicants because of the possibility of professional embarrassment.

Many felt that clients would be loathe to patronize a "loser" and the candidate who lost more than once might become the object of ridicule in the professional community. One lawyer member felt that publication would also encourage "the submission of screwball complaints from ex-clients." Another consideration was the possibility of "bad press" for the losers. As one lawyer on the appellate nominating commission said, "He shouldn't suffer some sniping reporter's dig that he tried and failed." The public, in short, has no more right to know who is on the list than what the vote in conflict was in the Court of Appeals in a given case.

Only a few suburban lawyers felt that it is in the public interest to at least publicize the names of the finalists. These respondents felt that:

> Publication of applicants' names will serve to insure that commission members receive information from sources not now available, in making informed selection decisions.

These lawyers also felt that the general public had a right to know who the commission was recommending as potential members of the judiciary.

Within the minority of "yes" responses to the question, most respondents felt that public solicitation was not an available or effective method. Apparently, the members are content to conduct the informal recruiting they recommended among themselves.

On the whole, however, lawyer and lay members were adamantly opposed to any publication of names of potential applicants at any stage of the selection process. They felt that publication could only serve as a major inhibition to application by qualified applicants. Most respondents, then, were eager to avoid any practice carrying with it the possibility of chilling applications to any greater extent.

The respondents voted against complete public disclosure of names of applicants by the substantial majority of 44 (19 lay, 25 lawyer) to 19 (6 lay, 13 lawyer). Even those voting for full disclosure of names opposed public

solicitation of comments by 17 to 8.

In their positions, the commission members seem to reflect the position taken in most merit selection jurisdictions. Only five or six (Alabama, Alaska, Florida, Missouri, and Tennessee,[29/] and perhaps New York, release names of all applicants. Ten (Idaho, Indiana, Iowa, Kansas, Montana, Nebraska, Oklahoma, Pennsylvania, South Carolina, and Utah)[29/] in addition to Maryland, release only the names of the nominees and sometimes even this is in the discretion of the commission or of the Governor. Finally, in a handful of states (Massachusetts, Vermont, and Wyoming, and possibly Colorado),[29/] only the names of the eventual actual appointee is released.

The majority of respondents, thus seem to favor a limited form of non-disclosure. Bar associations or their committees may be told the names of all applicants in order that these groups can make recommendations. Apparently, selected citizens may be contacted; the 1974 Executive Order provides that a commission "may ... seek a recommendation from interested citizens ...."[30/] But the general public is not to be informed.

There seems to be a facial inconsistency of some sort, hut I am inclined to agree that the danger of chilling possible applications outweigh the benefits to be gained from full disclosure. As subsequent discussion will show, lack of applicants is presently a major problem. If I were pressed about the possible logical inconsistency of release to the bar, but non-release to the public, I might resolve the issue by limiting release to the bar.

It should also be kept in mind that at least some degree of public input does occur. Candidates seemingly generate letters in support of themselves, and sometimes (although rarely) opponents of candidates or prospective candidates contact the commission.

29/ Dunn, supra note 2, Appendix V.

30/ There is a good deal of logic behind the argument that the Executive Order language about seeking only recommendations from bar associations and citizens is really intended to encourage submission of possible names to the commissions, not to authorize commissions to obtain from these sources comments on names already submitted.

In addition to citizen comments, there are other specific sources of information available to commissioners. Some of these could be used to generate data supplementing that supplied by bar associations, the candidates themselves, and what is ascertained independently by individual commissioners.

First, there is information as to pending bar disciplinary procedure. Under Maryland Rule BV 8.b.4, a commission chairperson can obtain from the Attorney Grievance Commission information as to whether or not a grievance is pending against an applicant. This information could be requested routinely by the State Court Administrator upon his receipt of any application.

Next, it would be possible to obtain criminal records maintained by the State Police Central Criminal Records Bureau. This procedure might be more complex and time-consuming than the AGC procedure, but still could be utilized.

Third, there is the possibility of making inquiry of one or more judges before whom the applicant has practiced. This could be one of the best and most useful sources of information. While Advisory Opinion No. 28 of the Committee on Judicial Ethics (4/3/75) indicates it is inappropriate for a judge to volunteer a letter of recommendation on behalf of a candidate, the same opinion provides that it is proper for a judge to respond to an inquiry from a member of a commission.

Agenda Proposal: That present procedures prohibiting general public release of all applicants' names be maintained, with only the names of the actual nominees released to the public.

Additional Agenda Proposal: If commissioners are concerned about securing additional background on candidates from sources possibly of greater reliability than the general public, that consideration be given to making routine inquiries to the AGC, selected judges, and, in special cases, to the State Police.

Second Additional Agenda Proposal: That chairpersons or other representatives of bar committees, when these committees exist, be invited to meet with the appropriate commissions to explain the basis for the bar committee action.

H. Interviews.

S.R. 76 of 1975 urges the Chief Judge to adopt rules "that would require the various judicial selection commissions to afford an opportunity to every applicant to appear before the commission to speak to his qualifications." In addition, a number of commission members have expressed an interest in the possibility of interviewing some, if not all, applicants. However, so far as I have been able to determine, formal commission interviewing has never been employed in Maryland.

It is somewhat difficult to determine just how widespread interviewing is in other states. A 1973 American Judicature Society survey of 13 jurisdictions apparently revealed that "most commissions conduct a confidential interview with each candidate."[31/]

Of the five plans discussed in detail in the AJS publication, "The Key to Judicial Merit Selection,"[32/] it appears that New York City, Alaska, Colorado, and Kansas employ interviewing to one degree or another, while Birmingham, Alabama does not.[33/]

The Maryland commission members rejected the concept of mandatory interviewing of all candidates by the wide margin of 43 (26 lay, 17 lawyer) to 7 (5 lay, 2 lawyer). They also opposed by 38 (26 lay, 12 lawyer) to 8 (2 lay, 6 lawyer) the proposition that every person subject to formal consideration should appear. On the other hand, the respondents voted 36 (23 lay, 13 lawyer) to 5 (4 lay, 1 lawyer) against prohibiting all interviews.

31/ ASHMAN and ALFINI, supra note 2. The book does not list which jurisdictions interviewed and which did not.

32/ Id.

33/ Id. at 92-224

The commissioners were evently divided as to whether any "finalist" who wished to should be permitted to appear. But by 28 (18 lay, 10 lawyer) to 22 (12 lay, 10 lawyer) they supported the concept of S.R. 76 - that any candidate who wished to should be interviewed. And by the even wider margin of 39 (24 lay, 15 lawyer) to 9 (3 lay, 6 lawyer) the 1975 respondents endorsed the proposal that interviews should be discretionary with each commission.

Arguments in favor of interviews include the position that they are an excellent way for both lay and lawyer members to gain information about candidates beyond that appearing in a questionnaire, especially information about personal "traits such as patience, courtesy, appearance, dignity, ability to articulate, etc." Proponents of interviewing point out that few people hire employees for even routine positions without an interview at some level. They also argue that a sophisticated group of commission members should not be taken in by a "slick Madison Avenue" sales job during an interview.

Opponents are concerned about the ability of a glib candidate to sell himself, and also about the time factor involved. This last is not to be lightly passed off. In the Third Judicial Circuit, for example, for the period March 1, 1975 - July 27, 1976, applications have averaged 20.59 per vacancy, for a low of 9 to a high of 35. But while the expeditious filling of judicial vacancies is critically important, it is also of fundamental importance that steps be taken to assure the best possible nominees.

Responses of commission members shed interesting light on the problem as they see it.

An urban lawyer:

> I feel that the commission should have the discretion and power to interview an applicant if a majority thereof felt that there was substantial reason for so doing and/or that its questions about the applicant could be clarified by personal interview of the applicant. The commission has no investigatory powers, and it should not be stripped of a method whereby doubts of a majority of the commission about certain phases of an applicant's activities, career, etc., cannot be clarified by personal interview.

It is no answer to say that if one applicant is interviewed then all should be interviewed in fairness to them. None of them have any right to appear before the commission, and the right of the commission should not be limited or circumscribed by requiring it to interview all applicants merely to achieve an appearance of fairness.

It should be borne in mind that no matter what a commission does or does not do, a disappointed candidate or self-appointed critic can find some charge to level against it. A commission and its members should be prepared to face criticism so long as they are satisfied that what they have done was fair and just under the circumstances.

I feel that if an individual commission member wishes to interview a particular candidate, he should have the right to request that that candidate meet with him; similarly, if two, three, or four commissioners wish to interview a candidate, they should have the right to ask him to meet with them at a mutually convenient time and place. This is particularly true in Baltimore City. Now that I am among the older segment of the local bar, there are many lawyers whom I don't know and as to whom I have no basis for reaching a conclusion as to their qualifications. Certainly, I should be able to interview him as a means of obtaining information relevant to his qualifications.

An urban lay member:

I believe that the interview concept is helpful only when an attorney applicant, or member of a lower court being considered for a higher court, specifically requests an interview or when the applicant is insufficiently known to the commission members or when there is a question among the commission members as to some minor point that should be clarified and which can only be accomplished by such interview.

Suburban lawyers:

I have not checked any of the preceding six options as I don't think any express my preference. It would be my recommendation that the commission grant interviews to anyone who requested an interview and that the commission have authority to request interviews with anyone it desired to confront personally.

I feel that the commissions should have liberal discretion to conduct interviews and make such additional inquiries as may be deemed necessary and proper to fulfill its duties and responsibilities, but should not be required to interview anyone.

Interviews are unfair. They put too much emphasis on a candidate's ability to sell himself. Selecting a judge is not a personality contest. In addition, candidates frequently apply for more than one vacancy during the same term of a commission. Such a person, having the benefit of several interviews with the commission, would apparently have an advantage over those whose names were submitted for the first time.

A suburban lay member:

> It is vastly important to observe how a person handles himself under scrutiny of his peers -- his actions, his reactions, his personality, his views, etc.

A rural lawyer:

> It is desirable particularly for lay members, but should not be required.

A rural lay member:

> I feel members of the commission should be free to contact applicants for additional information if they so desire, but that the applicant has the right to refuse.

A fair distillation of these responses, considered with the statistical analysis of replies, shows most commission members favoring the concept of discretionary interviewing, with the discretion vested in the commission.

While this procedure involves the possibility of unfairness because some candidates would be interviewed and some would not, it could be a way to test out the interviewing process. Interviews could be utilized, especially with relatively small numbers of applicants.

As noted below (pp. 54-55) in many cases, (except in the Third Circuit) ten or fewer people have applied for a vacancy. Ten to twelve people can be interviewed in one day, albeit a rather long one, assuming about half an hour per interview. Thus, if commission members feel strongly enough about the importance of their functions, it would not seem unreasonable that they should be expected to devote an occasional day (or part of a day) to interviewing. And some commissions might wish to employ teams of two to four commissioners to conduct interviews on behalf of the commission. Even individual commissioner interviews could be encouraged; these have been utilized informally in the past.

Agenda Proposal: That a general procedural rule be adopted to encourage the use of interviewing, in the discretion of a commission, as a supplement to other sources of information. The rule should suggest the alternatives of full commission interviews, commission team interviews, or interviews by individual

commissioners. This would represent a slight strengthening of present general Rule 3. It might also be useful to modify general Rule 2 to extend the time between final distribution of questionnaires and final meeting date to five days. This could facilitate individual interviews; see also the discussion at p. 49, infra.

J. Changes in Procedural Rules.

One possible rule change has just been discussed; in addition, earlier in this paper, we noted the desirability of possibly expanding Rule 4A , pertaining to conflicts of interest.

Although most questionnaire respondents thought the existing procedural rules are satisfactory, several other rules changes have been suggested, both by the questionnaire and by correspondence. These include:

1. Additional time for applicant responses.

2. Limitations on time within which the Governor may appoint (10-20 days suggested).

3. Maintenance of applicant files for at least 12 months.[34/]

4. Amendment of Rule 1 to require notification of a vacancy to be given to "interested persons or groups" in addition to the MSBA and other bar associations.

5. Making a secret vote discretionary with each commission.

6. Amendment of Rule 4 to provide for submission of names to Governor within less than 70 days from notification of existence of vacancy.[35/]

34/ The first three suggestions appeared in the questionnaire.

35/ Suggestions 4, 5, and 6 were proposed by a commission chairperson prior to circulation of the questionnaire.

7. Modification of Rule 1 to permit more flexibility in the calling of meetings.

8. Modification of Rule 2 to provide at least seven to ten work days from the deadline for submission of applications to the commission meeting date.

9. Modification of Rule 3 by inserting the word "eligible" before the word "person" in the first line.

10. Requiring each commission to elect a vice-chairperson (or provide for appointment of a vice-chairperson by the chairperson).[36/]

All of these suggestions demonstrate a real concern for the effective operation of the commissions. Some, however, probably do not require specific implementation.

For example, providing additional time for applicant response (No. 1) does not seem to present a real problem. Late filing of questionnaires is a rare phenomenom, and when it has occurred, commissions have almost invariably decided to consider these applications on their merits. There is no evidence suggesting that existing deadline requirements deter candidates from filing.

Also, the suggestion (No. 4) that notice be given "to interested persons or groups" would be very difficult to apply, in the absence of a clear definition of an "interested" person or group. I suggest that those persons or groups must, in general, be informed by the Daily Record, local media publicity, word-of-mouth, etc.

The suggestion (No. 5) that the secret vote requirement be made discretionary with each commission strikes at the heart of one of the provisions of the 1974 Executive Order designed to reduce the possibilities of political pressures and maneuvers.

36/ Suggestions 7 - 10 were submitted by another commission chairperson, prior to circulation of the questionnaire.

Provision for submission of names to the Governor in less than 70 days from the notification of vacancy (No. 6) seems unnecessary. Present Rule 2, which tracks paragraph 6(d) of the 1974 Executive Order, does not preclude the submission of a list within less than 70 days from the notification of vacancy. In point of fact, the time lapse in question, during the period March 1, 1975 to date, has usually approximated 30 days. It has never been as long as 60 days, although sometimes a 60-day figure has been approached in one circuit.[37/]

A need for greater flexibility regarding calling of meetings (No. 7) does not appear necessary. As a practical matter, this is always worked out in consultation between the chairperson and the secretary, and if the chairperson wishes to poll the membership as to appropriate dates, this is always permitted.

The proposed revision of Rule 3 to require evaluation of the questionnaires of only every "eligible" applicant (No. 9) seems undesirable, since part of the evaluation process by the commission should include a determination of "eligibility", both with respect to the Constitutional requirements and the provisions of the 1974 Executive Order.

The remaining proposed rule changes require more extended consideration.

Limitation on Governor's time to appoint. (No. 2)

An important aspect of any effective judicial selection system is a reasonable degree of expedition. Naturally, sufficient time must be allowed for the preparation and submission of applications, commission evaluation of the applicants, and gubernatorial decision-making after the list reaches the State House. But undue delay can discourage applicants, allow time for political maneuvering, and produce strain on the judicial system because of the prolonged existence of vacancies.

37/ These data suggest that even should interviewing be utilized, it might be possible to stay within the 70-day time frame.

Since March 1, 1975, the commissions have moved with remarkable expedition. As has been noted, the time lag from notification that a vacancy exists or is about to exist to submission of names to the Governor has ranged from just under 30 days to just under 60 days. But it is a different story as to what happens after that.

Examining the 19 vacancies that both occurred and were filled during Fiscal 1976, one finds that the lag between submission of names to the Governor and announcement of the appointment has averaged about 2.6 months, with the shortest delay being approximately one-tenth of a month and the longest 5.30 months. In over a quarter of the appointments, the lag has been four months or longer.

Although in general the nominating commissions have been notified of most vacancies at least a month before they occurred, it must also be recognized that a delay of anything from two weeks to over a month may occur between the date that the Governor announces the appointment and the date the new judge is actually sworn in. Thus, with respect to the 19 vacancies that both occurred and were filled during Fiscal 1976, the average elapsed time from vacancy to qualification of the new judge was about 2.7 months.

Keeping in mind that in all but seven of the 19 vacancies the Governor was given a list of names before the vacancy occurred, it can be seen that the problem of gubernatorial delay is real, even allowing for a reasonable time for the Governor to study the names submitted to him, interview the applicants, and conduct any additional investigation deemed desirable.

The problem, though, is what to do about it. Obviously, no rules of procedure promulgated by the Chief Judge could bind the Governor in the exercise of the latter's constitutional power to appoint judges.

The Governor could amend the Executive Order to require action within a specified time, but how could this be enforced?

Could the Governor be mandamused to act? Could an appointment not made within the required time be attacked as invalid?

It could be stipulated that a new list would be submitted if he failed to act within the time, but this might provide nothing but an opening for political shenanigans if the list didn't contain the "right" name or a stalemate if the commissions merely returned the same list or another list without the "right" name.

In the District of Columbia, the commission is empowered to nominate if the President fails to act within 60 days of submission of the list to them. In Colorado, if the Governor fails to appoint within 15 days of submission of the list to him, the chief justice appoints from the same list.

Both of these approaches involve additional problems. The former would vest in the commissions authority far beyond that envisioned for the commissions, and would tend to dilute accountability for appointment. The latter would tend to involve the Chief Judge in the political arena. With respect to either approach, a Constitutional amendment would be required.

Maryland's commission system is relatively young, and perhaps further experience is necessary before major constitutional changes should be proposed. Since in the last analysis, the integrity of the appointing process lies with the appointing authority, it might be useful to seek an informal but public commitment from that source.

Agenda Proposal: That the Governor be requested to make a commitment to announce a judicial appointment not more than 30 days after he has received the list from the appropriate nominating commission.

Maintenance of Files. (No. 3).

Some commissions maintain application files for considerable periods of time. This is convenient to applicants who re-apply, since they are usually allowed to do so by an "application letter" which merely updates the previously-filed application as necessary. On the other hand, an unduly extended retention

period can become burdensome for commission members. It should be possible to reach a reasonable middle ground.

Agenda Proposal: That the rules be amended to require retention of each personal data questionnaire for a period of 12 months from the commission meeting at which it was originally considered. If an applicant wishes to re-apply to the same commission for another vacancy which will be considered at a commission meeting to be held within the 12 month period, he should be allowed to do so by "application letter", updating the original questionnaire as necessary, and restating his willingness to accept the appointment if offered to him. Following the expiration of the 12 month period, the personal data questionnaire and any updating letter should be destroyed.

Require greater time-lag from filing deadline to meeting. (No. 8)

The suggestion that seven to ten working days elapse between the filing deadline and the commission meeting means, in effect, that the meeting could not be held until the passage of nine to fifteen calendar days had occurred. This seems an unnecessarily long delay, given the fact that personal data questionnaires are mailed to commission members as soon as they are received, thus permitting the members to begin reviewing them and seeking additional information at an early date.

On the other hand, some period of delay after the deadline is needed to provide for the transmittal of last-minute questionnaires, and to permit bar committees to meet. It is suggested that five clear calendar days (normally these would include not less than three working days) should be sufficient for these purposes and yet such a delay would not unreasonably slow the entire process.

Agenda Proposal: That Rule 2 be amended to provide that a final commission meeting may not be called before the expiration of five calendar days following the date of the filing deadline. However, the Rule should make it clear that a commission may meet for interviewing purposes more quickly if it so desires; see

p. 44, supra.

Election of vice-chairperson. (No. 10)

At least two commissions now have a vice-chairperson. The concept of such an office seems most desirable, as it will facilitate commission operations in the absence of the chairperson. The election of the chairperson by the commission members also appears to be a desirable way of reducing the appearance of possible gubernatorial domination.

Agenda Proposal: That the rules be amended to require each commission to elect a vice-chairperson by vote of a majority of the commission members when the election occurs (but not less than the majority of a quorum); the vice-chairperson to have authority to perform all duties of the chairperson in the latter's absence.

III. PERSONAL DATA QUESTIONNAIRES.

A. In General.

Every nominating commission throughout the country uses some form of questionnaire as a means of gathering basic data pertaining to applicants. Each Maryland commission uses one, and the respondents to the 1975 survey felt that this was an important part of the process.

Although the Maryland questionnaires are not uniform, generally they seem to elicit the same sort of information. The 1975 respondents showed broad admiration for the Third and Eighth Circuit forms (copies attached as Appendices G and H). Some of the specific suggestions made for improvement were:

1. Give percentage of appearances of a given number of years in different courts, and also the approximate percentage of litigation experience (the Third and Eighth Circuit questionnaires, as well as others, address these issues).

2. Give additional information as to non-legal (business) experience, including offices and directorships (a number of questionnaires, including the

Third and Eighth Circuits request such information).

3. List membership in civil and fraternal organizations (also included in a number of questionnaires).

4. Give references for professional ability, character, and credit (not generally requested).

5. Give information as to any treatment by any physician or hospital for any physical or emotional illness (sought to some extent by most if not all questionnaires; will be discussed in more detail under B, below).

6. Give information as to involvement in any Grand Jury proceeding (now included in most questionnaires).

7. Give information as to current involvement as a litigant (not generally asked).

8. Utilize introductory and "verification" provisions of the Third and Eighth Circuits.

Agenda Proposal: That a standard questionnaire, based on the Third and Eighth Circuit forms, be utilized by all commissions, with added questions dealing with current involvement in litigation. The precise form of any medical/psychiatric history questions should be as determined under B, below.

B. Physical and Psychiatric History Information.

Although one lawyer respondent warned that: "Financial disclosure, medical disclosure, and other private disclosures, as well as other demands of public service, discourage too many competent prospects already", there was a strong sentiment in favor of fuller physical and psychiatric disclosure.

The vote for fuller medical (physical) history information was 53 (29 lay and 24 lawyer) to 8 (5 lay, 3 lawyer). The vote for fuller psychiatric history was 49 (25 lay, 24 lawyer) to 9 (7 lay, 2 lawyer).

The caveat regarding too much disclosure is not to be dismissed lightly. Government today does probe a great deal, and serious questions have been raised about the desirability (and sometimes the legality) of questions relating to

such matters as past arrests (as opposed to convictions) and past treatment or hospitalization for emotional or psychiatric ailments. Indeed, Ch. 559, Acts of 1976, prohibits an employer from asking an applicant "any question... pertaining to any psychiatric or psychological condition or treatment which does not bear a direct, material, and timely relationship to the applicant's fitness or capacity to properly perform the activities or responsibilities of the desired position."[38/]

No rational person would exclude a person from judicial office or other employment because of a mere arrest for a trivial matter, or because of isolated brief treatment for a mental illness years ago. But the responses to the questionnaire do reveal a legitimate concern with the physical and emotional health of candidates for judicial office. This no doubt derives from an understanding of the importance and power of the position; a realization of the difficulties of removing an ailing judge from office; and a comprehension of the great harm that may be done by a judge who cannot perform his share of the work (or cannot perform it competently) because of sickness.

These considerations indicate the need for deeper inquiry than may be necessary for many other positions. They are considerations that exist nationwide. Commission members who responded to the 1973 American Judicature Society survey ranked mental health as the most relevant criterion in judicial selection and physical health as the second most relevant factor.[39/]

38/ This provision may not apply to a nominating commission, which is not an "employer". Also, in MD. ANN. CODE, art. 100 (where this statute is codified), "employer" does not usually include the State. But the 1976 law does indicate a certain policy in this area.

39/ ASHMAN and ALFINI, supra note 2 at 62.

The question thus becomes how best to produce relevant medical (including psychiatric) information. Most of the respondents favored fuller discussion in the questionnaire (34 - 22 lay, 12 lawyer). Other alternatives were: report from family physician (21 - 10 lay, 11 lawyer); report from independent physician (9 - 5 lay, 4 lawyer); and examination by a medical/psychiatric board (5 - all lawyer).

In other states, Alaska requires a medical certificate. Colorado frequently requires them.[39A/]

Agenda Proposal: That the physical/psychiatric questions in the Third/Eighth Circuit questionnaires remain as they are. That each applicant furnish, with his completed questionnaire: (1) a list of all physicians who have treated him in the past year; (2) a statement from each such physician as to the diagnosis and prognosis pertaining to that treatment; and (3) a certificate as to health, executed by a physician who has administered a full physical examination to the applicant within the 12 months preceding the date of his personal data questionnaire.

This certificate should be at least as specific as a form normally used to furnish medical information in connection with a life insurance application. It should include a statement that the physician has examined the applicant's answers to the medical portion of the questionnaire; that he has examined the statements furnished under (2) above; and that his certificate is given with knowledge of this information as well as his personal examination of the applicant.

39A/ Id. at 52.

IV. GENERAL PROBLEMS.

A. The standard of "legally and professionally most fully qualified".

Although this standard carries its own ambiguities, so does almost any other subjective standard ("highly qualified," "fully qualified," etc.).

Respondents seemed to accept the notion that use of this standard indicated that commissions were supposed to nominate people who were more than merely "qualified". There were no substantial suggestions as how this standard might be better expressed.

B. Dearth of Applicants.

A small number of applicants has plagued many of the commissions. In the Eighth Judicial Circuit, between March 1, 1975 and August 15, 1976, the number of applicants per vacancy has ranged from 8 to 17. The average has been 9.5 for Supreme Bench vacancies and 14 for District Court vacancies. This seems shockingly small in a city with perhaps 3,000 practicing lawyers, a substantial number of whom reside there. It is perhaps more surprising than the fact that fewer than four applicants have applied for any vacancy in the First Circuit, and only two for each vacancy in the Second.

In the Sixth Judicial Circuit, all vacancies have been in Montgomery County. The average number of applicants has been 6.5 for the circuit court and 7 for the District Court. The picture is similar in the Seventh Circuit.

Even at the appellate level, there were only 10 applicants for the last Court of Appeals vacancy, and 7 for the Court of Special Appeals position, both of them involving Baltimore City.

The only significant difference appears to be in the Third Circuit, where applicants have ranged from 9 (a Harford County circuit court vacancy) to 35 (a Baltimore County District Court vacancy). In that circuit, applicants have averaged 14 for each circuit court vacancy (the figure would be close to 16 were Harford County removed from the computation) and 26 for each District Court vacancy.

It thus seems apparent that relatively small numbers of people are applying for judicial vacancies. While this does not necessarily mean that no highly qualified people are applying, it certainly narrows the range of choice for both the commissions and the Governor.

What are the causes for this dearth of applicants, or, more precisely, why do the commission members think this situation exists?

Both in overall figures and when broken down into lawyer and lay person votes, two elements of the judicial selection process are viewed as the most effective deterrent to applications: the first choice of both segments was the inadequate judicial compensation (48 - 26 lay, 22 lawyer); the second choice of both was the unwillingness of potential applicants to face election (40 - 23 lay, 17 lawyer). (These two deterrents were thought to be the most important because they were given, in turn, the largest number of "first place votes" by both lawyers and lay persons. That is, the largest number of lawyers felt that inadequate judicial compensation was the most important deterrent, as did the largest number of lay persons. The second largest vote among both lawyers and lay persons was for the deterrent effect of the election process).

In terms of the compensation issue, the consensus among lawyers who felt salaries were inadequate was that if the "most fully qualified" are truly desired, then the salaries must be increased to afford financial rewards for leaving a presumably lucrative practice in favor of the bench. It should be noted that this concern was as equally voiced among all counties and circuits, and was not a problem peculiar to the urban or more affluent suburban circuits. Salaries were viewed as inadequate across the board.

A recent (1975) survey of lawyer economics shows that in 1974 the median income of judges was second out of eight legal occupational categories. The leading category was that of partners/shareholders in law firms. However, it must be realized that the salary range for judges is rather small (at present

from $33,300 to $45,200), whereas the range for lawyers in private practice is tremendous. Thus, a partner in practice from before 1935 - 1974 (40 years) might anticipate a median income of $56,000. And, some partners in large firms receive incomes in six figures.[40/]

While there are compensations, financial and otherwise, derived from holding judicial office over and above salary, and while it is plain that the State can never hope to offer compensation equal to the high earnings of private lawyers, it may well be that it could offer judges compensation which will at least not require drastic reduction in the incumbent's standards of living.

There were few comments as to why election requirements pose a problem, presumably because it is obvious that the risk of losing an election would deter applicants, and the problems, and disclosures, associated with running are viewed as less than desirable.

The travails of the 1974 and 1976 elections (the latter not yet concluded) and the tragedies of some prior years tell their own story. A review of the Bar Association materials cited earlier in this paper gives the detailed arguments,[41/] but Governor Mandel probably summed it up as well as anyone when he spoke to the MSBA on June 17, 1971:

> I think [improved judicial selection] is the one final step we have to take in order to have a far better system of justice .... [W]e have to go back and try again ... because as time goes on ... we are finding it more and more difficult to attract to the judgeship the quality that we want.

40/ See MD. BAR J. No. 2 (June 1976) unpaginated section color-coded blue following p. 32.

41/ See supra note 2.

In any case, the issue of judicial salaries, when coupled with the election requirement, seem to present a formidable obstacle to the application process. This would be especially true in the case of a private practitioner who, while willing to overlook what might be a substantial decrease in income, would simply not take the risk of facing an election which he might lose, where losing an election might alter his standing in the eyes of the community and of his clients, in addition to producing real financial damage. As one lawyer commented, "the combination of (salary considerations and election requirements) are almost insuperable."

Evidently, inadequate notice of vacancies was not thought to be a problem, since few (3 in all) persons saw it as inadequate, and none of those who did felt that it was the most important problem. In addition, very few votes picked lack of confidence in the commission as being a problem; of the four lawyers who did think so, only one thought it was the most important, and of the three lay persons who felt it was a deterrent, only one thought it was the most important. Of course, since commission members themselves were responding, the answers here may not have been totally disinterested.

While substantial numbers of both lawyers and lay persons voted that both financial disclosure requirements and concern about "leaks" (as to presumably favored candidates) were deterrents to applicants, few saw them as highly important factors. However, since substantial numbers of both groups picked these as deterrents, it is clear that to various extents these are viewed as important considerations.

A substantial number of lay persons saw concern in exposure to the public and media as a major, though not primary (i.e., not first place) concern; few lawyers shared this view. In contrast, a substantial number of lawyers thought that the restrictions of the judicial office presented a major, though not primary concern, while very few of the lay persons did so. This may well be

because lay persons are not fully familiar with these restrictions. Since lawyers constitute the potential pool of judicial applicants, one would be more inclined to accept their view of the situation and note that while public exposure causes them relatively little worry, the restrictions of office are much greater deterrents. While the exact nature of these restrictions were not specified, it might be fair to say that a large consideration might in fact be the financial one, since clearly the possibility of private practice, and also private business activity is drastically altered, and financial disclosure and social restraints should be considered as well.

Most respondents who commented about what the commissions or the commissioners could do to encourage more applications simply reiterated what they saw as the primary deterrent and stated that it should be reduced or done away with. Some stressed the need for a greater overall level of concern in the general public and, importantly, within the commissions themselves. One person who had been active in commission work for many years stated that much more enthusiasm and aggressive input within the commission was necessary. It is true that some persons felt the dearth of applicants is not a serious problem; those that thought so usually voiced the following rationale:

> "Dearth" is a relative term. Like the Marines, we are looking for a "few good men." I have very limited experience as a commissioner, having participated in only one selection. However, the commissioners who had more experience felt that there was a "dearth" of applicants. I did not since we were able to nominate more than the minimum number of required recommendations. There are, at best, only a limited number of lawyers, who, for a number of reasons, desire a judgeship, the same as there are only a limited number of lawyers who would be interested in any one of a variety of positions. A judgeship contains certain inherent characteristics which will deter many, i.e., salary, "seclusion", boredom, etc. Such deterrents are inevitable.

As this lawyer himself concedes, however, most commissioners do feel that there is a small number of applications. One lawyer rather succintly stated what may be at least one general point of view on the subject as to why there is in fact a dearth of at least well-qualified applicants:

> The most common comment that I have heard from competent lawyers aged 30 to 50 years of age is that they are not yet willing to give up everything for the security of a judgeship. Possibly, if there were a possibility for such lawyers to become judges, and if and when desired to return to the practice of law without losing all their pension rights, some competent men in the stated age bracket would consider judgeships. My observations to date have been that the least competent, the least successful, the least economically secure, and the aged display the greatest interest in obtaining a judgeship. Furthermore, and sadly, many members of the bar think that a judgeship should be a final transition to security and retirement regardless of qualification. "Let him be judge, we'll only be stuck with him for a few years, and then there will be an opening again; in the meantime we'll share some of his business!

A Fifth Circuit lay member of the commission emphasized problems within the commission itself as greatly exacerbating any problems that may exist in receiving a too small number of applications. Specifically, he cited inaction on the part of commissions as a major issue, and said that:

> A more aggressive interest in and action on behalf of corrective measures ... seem to me basic to stimulating an influx of better and more candidates for a vacancy.

On the other hand, this same person noted that while procedures have been used successfully in other states to implement the merit concept through different organizational and procedural devices (as suggested by the literature of the American Judicature Society) "the time and effort to review and extract ... [those procedures] we could use here would be prohibitive personally." Thus, it seems that even those most aware of the problems (and their potentially effective solutions) may be less than willing to take the time from their own lives to improve the system. To that extent, it may be worthwhile to explore the possibility of making the job and status of commissioners much more enticing, and much more worth added time and effort than it now is. It may be that by improving the quality of our commissioners, a large part of the problem in judicial selection will simply disappear. As one lawyer put it, the work of the commission is a continuous and potentially demanding task.

Agenda Proposal: That commission members formulate and present to the Governor and General Assembly their major concerns regarding factors that dissuade potential candidates from applying for judicial vacancies, placing special emphasis on the need to eliminate contested judicial elections and the importance of appropriate judicial compensation (matters within the realm of legislative redress) and on the control of "leaks" about potentially favored candidates (a matter that the Governor cannot necessarily control, but can to some degree counteract).

CONCLUSION

Although the preceding extended discussion of problems may suggest otherwise, the nominating commission system in Maryland is working reasonably well, probably better than the system prior to mid-1970, when these matters were left largely to the uneven, and various, approaches of numerous bar associations (in addition to the usual political processes). At the very least, the nominating commission procedure is publicly established by a public official (the Governor) who is accountable to the voters. And the commission operation since 1974 seems to be improving with respect to the previous operation.

These conclusions can be asserted because of the conscientious and dedicated approach of most lay and lawyer commissioners; however, there is clearly room for further improvement.

There will never be a universally accepted manner of judicial selection, although the requisites of judicial selection, in general terms, are easily and universally agreed upon; the translation of those generalities into the mechanical "nuts and bolts" specifics will be, and should be, a never-ending task of the bar, the public, and all three branches of our government. We need continued efforts of the commissions to gain respect in their integrity and fairness, and competency in their recommendations. I would also emphasize

continued efforts to work with the governor, in an effort to robe his selection with the same respect and the divorcing of that selection from all personal considerations born of friendship or politics. Structural and systemic changes can advance these ends.

But the intricate demands of a commission, and the importance of its task, dictate that as a body each must function effectively. To do so, commission members must be willing to perform more than a minimal job; they must be interested in doing the best possible job of selecting judges in the most effective way, and they must be willing to expend their own time and energy in the process, perhaps even a greater amount of their time and energy than is now being expended.

I hope that circulation of this paper will generate both discussion and recommendations, looking to the continued improvement of the process, and the achievement of its ultimate objective - selection of the best possible judges for the people of Maryland.

01.01.1977.08

JUDICIAL NOMINATING COMMISSIONS

WHEREAS, By Executive Order 01.01.1974.23, dated December 18, 1974, Governor Marvin Mandel rescinded two previous Executive Orders and created the Appellate Judicial Nominating Commission and the Trial Court Judicial Nominating Commissions for the purpose of recommending to the Governor the names of persons for appointment to the appellate courts and trial courts of Maryland, and provided for the composition and general functions and procedures of the Commissions; and

WHEREAS, This Executive Order requires that a list containing a certain minimum and maximum number of names or nominees be submitted to the Governor by the appropriate Nominating Commission for each vacancy which occurs on an Appellate Court or a Trial Court, from which list the Governor voluntarily has bound himself to select a person to fill the judicial office; and

WHEREAS, The Order further authorizes a Nominating Commission to recommend fewer than the minimum number of names under certain conditions, including the situation in which a Commission concludes that there are less than the minimum number of persons willing to accept appointment who are legally and fully professionally

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qualified; and

WHEREAS, Although the Order, in establishing the required minimum number of names to be submitted for a particular judicial vacancy, takes into account such factors as the nature of the judicial office to be filled and the number of lawyers in the County, the Order authorizes each Commission to submit in some instances as few as two names for a judicial vacancy, regardless of the nature of the judicial office to be filled or the number of lawyers in the County represented by the office, and without the prior approval of the Governor; and

WHEREAS, This exception to the general rule of a required minimum number of names may result in situations which indirectly limit rather than aid the Governor in exercising the Constitutional dury reposed in him to appoint duly qualified persons to the courts of Maryland; and

WHEREAS, Although the system created by this Executive Order has worked well and has materially assisted in assuring the appointment of qualified persons in the Judiciary of Maryland, I believe that certain refinements to the Order will improve further the reforms establsihed by the previous Executive Orders, and, therefore, better assist in achieving the goals stated in the Executive Orders of July 6, and July 17, 1970;

NOW, THEREFORE, I, BLAIR LEE LLL, ACTING GOVERNOR OF MARYLAND, BY VIRTUE OF THE AUTHORITY VESTED IN ME BY ARTICLE II, SECTIONS 6(B) AND 24, AND ARTICLE IV, SECTIONS 5, 5A, AND 41D OF THE CONSTITUTION OF MARYLAND, AND BY ARTICLE 41, SECTIONS 15C and 15CA OF THE ANNOTATED CODE OF MARYLAND, HEREBY PROMULGATE THE FOLLOWING ORDER AMENDING EXECUTIVE ORDER 01.01.1974.23:

1. Extension of Terms of Present Commissioners

The terms of the members of the Commission on Appellate Judicial Selection and the eight Commissions on Trial Court Judicial Selection are extended until their successors are duly chosen.

2. Rescission on Previous Executive Order

The Executive Orders issued by me dated July 6, 1970, July 17, 1970, and April 21, 1971, relating to the Commission on Appellate Judicial Selection and the Commissions on Trial Court Judicial Selection are rescinded.

3. Appellate Judicial Nominating Commission

(a) Creation and Composition

The Appellate Judicial Nominating Commission is created as part of the Executive Department. It consists of 13 persons and a non-voting Secretary, chosen as follows:

(1) One person, who shall be the Chairman, shall be appointed by the Governor. The Chairman may but need not be a lawyer, and shall be selected from the State at

large. [He may not be an elected State official or a full-time employee of the State.] HE MAY NOT HOLD AN OFFICE OF PROFIT OR TRUST UNDER THE CONSTITUTION OR LAWS OF THIS STATE, AN OFFICE IN A POLITICAL PARTY, OR BE A FULL-TIME EMPLOYEE OF THE STATE.

(2) One person shall be appointed by the Governor from each of the Appellate Judicial Circuits, and shall be a resident and registered voter in the circuit from which he is appointed. These persons may not be lawyers, [elected State officials, or full-time employees of the State] HOLD AN OFFICE OF PROFIT OR TRUST UNDER THE CONSTITUTION OR LAWS OF THIS STATE, AN OFFICE IN A POLITICAL PARTY, OR BE FULL-TIME EMPLOYEES OF THE STATE.

(3) One person, who shall be a member of the Maryland Bar, shall be elected by the members of the Maryland Bar in each of the six Appellate Judicial Circuits. THESE PERSONS MAY NOT HOLD AN OFFICE OR PROFIT OR TRUST UNDER THE CONSTITUTION OR LAWS OF THIS STATE, AN OFFICE IN A POLITICAL PARTY, OR BE FULL-TIME EMPLOYEES OF THE STATE. The elections in each circuit shall be conducted by the State Court Administrator pursuant to rules promulgated by the Court of Appeals.

(4) THE COMMISSION SHALL ELECT A VICE-CHAIRMAN FROM AMONG ITS MEMBERS, BY VOTE OF A MAJORITY OF ITS FULL AUTHORIZED MEMBERSHIP. THE VICE-CHAIRMAN MAY PERFORM ANY OF THE DUTIES OF THE CHAIRMAN DURING THE LATTER'S ABSENCE, UNAVAILABILITY, OR INABILITY TO ACT.

[(4)](5) The State Court Administrator is, ex officio, the non-voting Secretary of the Commission.

(b) Terms

The terms of the members of the Commission [are coextensive with the term of the Governor] EXTEND TO THE DATE OF QUALIFICATION OF THE GOVERNOR ELECTED AT EACH QUADRIENNIAL ELECTION, and until their successors are duly chosen. HOWEVER, IF THE COMMISSION MEETS NOT LESS THAN TWICE IN ANY CALENDAR YEAR, AND IF ANY MEMBER OF THE COMMISSION WHO IS NOT DISQUALIFIED FROM PARTICIPATION FAILS TO ATTEND AT LEAST 50 PERCENT OF THE COMMISSION MEETINGS HELD IN THAT CALENDAR YEAR, THE SERVICE OF THAT COMMISSION MEMBER IS AUTOMATICALLY TERMINATED AT THE END OF THE CALENDAR YEAR AND ANOTHER MEMBER SHALL PROMPTLY BE SELECTED TO REPLACE HIM.

(c) Vacancies

If a vacancy occurs on the Commission by reason of the death, resignation, **REMOVAL**, or disqualification of a member appointed by the Governor, his successor shall be appointed by the

Governor in accordance with Paragraph 3(a). If the vacancy occurs by reason of the death, resignation, REMOVAL, or disqualification of a member elected by the members of the Bar, his successor shall be selected pursuant to rules promulgated by the Court of Appeals.

(d) Ineligibility for Judicial Appointment

The Governor shall not appoint a member of the Commission to a vacancy on an Appellate Court during the term for which the member was chosen.

(e) Number of Recommendations

The Commission shall submit to the Governor a list of not less than five nor more than seven nominees for each vacancy on an Appellate Court.

4. Trial Court Judicial Nominating Commissions

(a) Creation and Composition

A Trial Court Judicial Nominating Commission is created as part of the Executive Department for each of the eight judicial circuits of the State. They each consist of 13 persons, and a non-voting Secretary, chosen as follows:

(1) One person, who shall be the Chairman, shall be appointed by the Governor. The Chairman may but need not be a lawyer, but shall be a resident and registered voter of the Judicial Circuit. HE MAY NOT HOLD AN OFFICE OF PROFIT OR TRUST UNDER THE CONSTITUTION OR LAWS OF THIS STATE, AN OFFICE IN

A POLITICAL PARY, OR BE A FULL-TIME EMPLOYEE OF THE STATE.

(2) Six persons shall be appointed by the Governor from among the residents and registered voters of the Judicial Circuit. These persons may not be lawyers, [elected State officials, or full-time employees of the State] HOLD AN OFFICE OF PROFIT OR TRUST UNDER THE CONSTITUTION OR LAWS OF THIS STATE, AN OFFICE IN A POLITICAL PARTY, OR BE FULL-TIME EMPLOYEES OF THE STATE. If the Judicial Circuit contains more than one county, at least one person shall be appointed from each county in the Circuit, and shall be a resident and registered voter of such county.

(3) Six persons shall be members of the Maryland Bar who [reside and are registered voters in the Circuit] ARE REGISTERED TO VOTE IN STATE ELECTIONS AND WHO MAINTAIN THEIR PRINCIPAL OFFICES FOR THE PRACTICE OF LAW IN THE CIRCUIT. They shall be elected by the members of the Maryland Bar who [reside and are registered voters in the Circuit] ARE REGISTERED TO VOTE IN STATE ELECTIONS AND WHO MAINTAIN THEIR PRINCIPAL OFFICES FOR THE PRACTICE OF LAW IN THE CIRCUIT. THESE PERSONS MAY NOT HOLD AN OFFICE OF PROFIT OR TRUST UNDER THE CONSTITUTION OR LAWS OF THIS

STATE, AN OFFICE IN A POLITICAL PARTY, OR BE FULL-TIME EMPLOYEES OF THE STATE. The election shall be conducted by the State Court Administrator pursuant to rules promulgated by the Court of Appeals.

(4) EACH COMMISSION SHALL ELECT A VICE-CHAIRMAN FROM AMONG ITS MEMBERS, BY A VOTE OF A MAJORITY OF ITS FULL AUTHORIZED MEMBERSHIP. THE VICE-CHAIRMAN MAY PERFORM ANY OF THE DUTIES OF THE CHAIRMAN DURING THE LATTER'S ABSENCE, UNAVAILABILITY, OR INABILITY TO ACT.

[(4)] (5) The State Court Administrator is, ex officio, the non-voting Secretary of each Commission.

(b) Terms

The terms of the members of the Commission [are coextensive with the term of the Governor] EXTEND TO THE DATE OF QUALIFICATION OF THE GOVERNOR ELECTED AT EACH QUADRIENNIAL ELECTION, and until their successors are duly chosen. HOWEVER, IF A COMMISSION MEETS NOT LESS THAN TWICE IN ANY CALENDAR YEAR, AND IF ANY MEMBER OF THE COMMISSION WHO IS NOT DISQUALIFIED FROM PARTICIPATION FAILS TO ATTEND AT LEAST 50 PERCENT OF THE COMMISSION MEETINGS HELD IN THAT CALENDAR YEAR, THE SERVICE OF THAT COMMISSION MEMBER IS AUTOMATICALLY TERMINATED AT THE END OF THE

CALENDAR YEAR AND ANOTHER MEMBER SHALL PROMPTLY BE SELECTED TO REPLACE HIM.

(c) Vacancies

If a vacancy occurs on a Commission by reason of death, resignation, **REMOVAL**, or disqualification of a member appointed by the Governor, his successor shall be appointed by the Governor in accordance with Paragraph 4(a). If the vacancy occurs by reason of death, resignation, **REMOVAL**, or disqualification of a member elected by the members of the Bar, his successor shall be selected pursuant to rules promulgated by the Court of Appeals.

(d) Ineligibility for Judicial Appointment

The Governor shall not appoint a member of these Commissions to a vacancy on a Trial Court during the term for which they were chosen.

(e) Number of Recommendations

The Commission shall submit to the Governor a list of not more than seven names for each judicial vacancy on a Trial Court within its Circuit. The Commission shall submit a minimum number of names in accordance with the following table:

Number of Lawyers Contributing to Client's Security Trust Fund in the County	Minimum Number of Names Per Vacancy
(1) More than 750	5
(2) 201-750	4
(3) 31-200	3
(4) 30 or less	2

5. Recommending Less than Minimum Number

(a) A Commission may recommend fewer than the minimum number of nominees required by Paragraphs 3(e) and 4(e) under the following conditions:

(1) If multiple vacancies exist for which recommendations must be made, a Commission may submit a list containing the required minimum number of nominees for one vacancy plus two additional names for each vacancy in excess of one; or

(2) It it concludes that there are less than the minimum required number of persons willing to accept appointment who are legally and professionally qualified. However, a Commission shall obtain the prior approval of the Governor in order to recommend less than four names under Paragraph 3(e), or less than three names under Paragraph 4(e) (1) or (2), or less than two names under Paragraph 4(e) (3) or (4).

(b) If any person recommended for appointment notifies the Governor that he is unwilling to accept appointment, or if he is disqualified, or is otherwise unavailable for appointment, a Commission may, upon request of the Governor, submit an additional nominee if needed to increase the list to the prescribed minimum number of names.

(c) If the position to be filled is then held by an incumbent judge who is eligible for and desires reappointment, the Commission, with the prior approval of the Governor, may submit a list with less than the prescribed minimum number of names.

6. Commission Procedures

(a) Each Commission shall operate under procedures specified in rules adopted by the Chief Judge of the Court of Appeals consistent with this Executive Order.

(b) Upon notification by the Secretary that a vacancy exists or is about to occur in a judicial office for which a Commission is to make nominations, the Commission shall seek and review applications of proposed nominees for the judicial office. APPLICATION SHALL BE MADE ON THE FORM PRESCRIBED BY THE SECRETARY. The Commission shall notify the Maryland State Bar Association, Inc. and other appropriate bar associations of the vacancy, and shall request recommendations from them. The Commission may also seek a recommendation from interested citizens and from among its own members.

(c) The Commission shall evaluate each proposed nominee. IN THE COURSE OF ITS EVALUATION, A COMMISSION MAY SEEK INFORMATION BEYOND THAT CONTAINED IN THE PERSONAL DATA QUESTIONNAIRE SUBMITTED TO IT. IT MAY OBTAIN PERTINENT INFOR-

MATION FROM KNOWLEDGEABLE PERSONS KNOWN TO COMMISSION MEMBERS, THE ATTORNEY GRIEVANCE COMMISSION, JUDGES, PERSONAL REFERENCES GIVEN BY THE CANDIDATE, CRIMINAL JUSTICE AGENCIES, OR OTHER SOURCES. A CRIMINAL JUSTICE AGENCY, INCLUDING THE CENTRAL REPOSITORY, IS AUTHORIZED TO RELEASE CRIMINAL HISTORY RECORD INFORMATION, INCLUDING CONVICTION AND NON-CONVICTION DATA, TO A COMMISSION, UPON THE REQUEST OF THE COMMISSION CHAIRMAN, FOR THE PURPOSE OF EVALUATING A CANDIDATE. It shall select and nominate to the Governor the names of persons it finds to be legally and most fully professionally qualified. NOT LESS THAN NINE COMMISSION MEMBERS SHALL BE PRESENT AT THE VOTING SESSION. No person's name may be submitted unless he has been found legally and most professionally qualified by a vote of a majority of the entire authorized membership of the Commission, taken by secret ballot.

(d) The Commission shall report to the Governor, in writing, the names of the persons it nominates as legally and fully professionally qualified to fill a vacancy. The names of persons shall be listed in alphabetical order. The report shall be submitted within 70 days after notification by the Commission's Secretary that a vacancy exists or is about to occur. The Commission shall release its report to the public concurrently with submission of the report to the Governor.

(e) Each Commission shall distribute informational and educational materials concerning judicial vacancies and the functions of the Commission, in order to inform the public of the Judicial selection process of the State.

7. CONFIDENTIALITY

EXCEPT FOR THE NAMES OF THOSE INDIVIDUALS ACTUALLY NOMINATED TO THE GOVERNOR BY A COMMISSION, THE NAME OF EACH INDIVIDUAL WHO SUBMITS A PERSONAL DATA QUESTIONNAIRE TO A COMMISSION IS CONFIDENTIAL AND MAY NOT BE MADE PUBLIC BY ANYONE. HOWEVER, THE SECRETARY MAY RELEASE NAMES OF THESE INDIVIDUALS TO A BAR ASSOCIATION COMMITTEE OR TO THE PRESIDENT OF A BAR ASSOCIATION, UPON RECEIVING SATISFACTORY ASSURANCES THAT THE COMMITTEE OR PRESIDENT WILL NOT RELEASE OR PERMIT THE RELEASE OF THE NAMES TO THE PUBLIC. A PERSONAL DATA QUESTIONNAIRE SUBMITTED TO A COMMISSION IS CONFIDENTIAL AND MAY NOT BE RELEASED BY ANYONE OTHER THAN THE APPLICANT, EXCEPT THAT THE SECRETARY SHALL FORWARD TO THE GOVERNOR THE PERSONAL DATA QUESTIONNAIRES OF THOSE INDIVIDUALS ACTUALLY NOMINATED TO THE GOVERNOR BY A COMMISSION.

[7](8) Appointment From List

The Governor shall fill a judicial vacancy by selecting a person from the list submitted by the appropriate Commission.

[8] (9) Definitions

As used in this Executive Order:

(a) "Appellate Court" means the Court of Appeals of Maryland and the Court of Special Appeals of Maryland;

(b) "Trial Court" means the District Court of Maryland, the Circuit Court of a County, and a court of the Supreme Bench of Baltimore.

[9] (10) Effective Date

This Order is effective October 4, 1977.

[10] (11) Applicability

The Amendments made by this Order to Paragraph 5(a)(2) are applicable to any judicial vacancy which exists on October 4, 1977 or occurs thereafter, and for which a Commission has not submitted a report and nomination to the Governor.

GIVEN Under My Hand and the Great Seal of the State of Maryland, in the City of Annapolis, this 4th day of October, 1977.

COURT OF APPEALS OF MARYLAND

APPELLATE AND TRIAL COURT JUDICIAL
SELECTION REGULATIONS

ORDER

WHEREAS on December 18, 1974, His Excellency, Marvin Mandel, Governor of Maryland, by Executive Order, continued the existence of the Governor's Commission on Appellate Judicial Selection and the eight Governor's Commissions on Trial Court Judicial Selection, at the same time restructuring the Commissions in certain respects, and extending the terms of their members until the selection of their successors; and

WHEREAS in the 1974 Executive Order, the Governor directed that six members of each Commission should be lawyers, elected by fellow lawyers of the State in an election "conducted by the State Court Administrator pursuant to rules promulgated by the Court of Appeals"; and

WHEREAS the Court of Appeals of Maryland, desiring to accede to the proposals of the Governor, has considered the regulations it adopted on October 19, 1970, to govern similar elections, as modified by certain suggestions submitted by the State Court Administrator, which modified regulations read as follows:

I
Definitions

Administrator means the State Court Administrator.
Administrative Office means the Administrative Office of the Courts.
Appellate Commission means the Governor's Commission on Appellate Judicial Selection created by Executive Order dated December 18, 1974, and any successor commission created by any reproclamation of said Order.
Judicial Commission means either the Appellate Commission, or a Trial Court Commission, or both, according to context.
Lawyer means a member in good standing of the Bar of this State who is a member, including a voluntary member, of the Clients' Security Trust Fund and who is current in his payments to the Fund.
Member means an elected lawyer member of a judicial commission.
Office and Principal Office. Office means an office for the practice of law in which an attorney either as proprietor (alone or in partnership), or as an employee of such a proprietor or of an agency of government or of a business or other non-governmental concern, organization or association, usually devotes a substantial part of his time to the practice of law during ordinary business hours in the traditional work week. "Principal Office" means an office maintained for the practice of law in which an attorney, either as proprietor (alone or in partnership), or as an employee of such proprietor or of an agency of government or of a business or other non-governmental concern, organization or association, usually devotes the majority of his time to the practice of law during ordinary business hours in the traditional work week. In the case of both definitions, an attorney shall be deemed to be "in" such an office even though he is temporarily absent therefrom in the performance of duties of a law practice actively conducted from that office.
Trial Court Commission means the Governor's Commission on Trial Court Judicial Selection created by Executive Order dated December 18, 1974, and any

successor commissions created by any reproclamation of said Order.

II

Commission on Appellate Court Judicial Selection

1. Allocation of Member Positions.

There shall be one member of the Appellate Commission from each Appellate Judicial Circuit.

2. Eligibility to Vote.

Any lawyer who either resides or maintains an office in this State is eligible to vote for the member of the Appellate Commission to be elected from the Appellate Judicial Circuit in which the lawyer either resides or maintains his office, but no lawyer may vote in more than one Appellate Judicial Circuit.

3. Any one who either resides or maintains an office within the State and who [is not an elected governmental official or a full-time Federal, State, or municipal official] MEETS THE ELIGIBILITY REQUIREMENTS OF THE EXECUTIVE ORDER ESTABLISHING JUDICIAL NOMINATING COMMISSIONS is eligible to serve as the Appellate Commission member from the Appellate Judicial Circuit in which he either resides or maintains his office.

4. Nominations.

Nomination for election as a member of the Appellate Commission shall be by written petition filed with the Administrative Office. Each petition shall state the name of the nominee and the Appellate Judicial Circuit from which he seeks election. The nominee shall verify in the petition his home and office addresses, his status as a lawyer and his intent to serve if elected. Each petition shall be signed by at least fifteen lawyers, other than the nominee, each of whom shall maintain his principal office in the Appellate Judicial Circuit from which the nominee is being nominated. Each lawyer who signs the petition shall also verify in the petition the address and the Appellate Judicial Circuit in which his principal office is located. No lawyer may be nominated from more than one Appellate Judicial Circuit in the same election.

5. Ballots.

As soon as practicable after the close of nominations under Regulation 17, the Administrative Office shall mail or deliver the ballots and eligibility cards for an Appellate Judicial Circuit to the eligible voters in that Circuit. Ballots shall list the nominess in each Appellate Judicial Circuit in alphabetical order and shall contain a block printed next to the name of each nominee, to be used in voting. Ballots shall set forth the date of mailing thereof and instructions advising the voter that he has the right to vote for one nominee from his Appellate Judicial Circuit. The eligibility card shall contain a legend and signature line for the voter to use in verification of his voter eligibility.

6. Voting.

Each voter may vote for one nominee from the Appellate Judicial Circuit in which he either resides or maintains an office. No voter may vote for more than one nominee. In order to be valid both (1) the voter's ballot, enclosed in a plain sealed envelope, and (2) the eligibility card, signed by the voter, must be returned to the Administrative Office within 15 days of the date of mailing marked on the ballot. No write-in voting is permitted.

7. Elections - Ties.

In each Appellate Judicial Circuit, the nominee from that Circuit who receives the highest number of votes of all votes cast by the eligible voters of that Circuit shall be elected. In the event of a tie vote between two or more nominees from the same circuit, the member shall be selected from among the nominees so tied by lot, pursuant to procedures prescribed by the Administrator.

III
Commissions on Trial Court Judicial Selection

8. In each multi-county Judicial Circuit there shall be at least one member of the Judicial Commission for that circuit [from] WHO MAINTAINS HIS PRINCIPAL OFFICE FOR THE PRACTICE OF LAW IN each county from which there is a nominee. Such members are hereinafter called "county members."
9. Any lawyer who [both resides and] IS REGISTERED TO VOTE IN STATE ELECTIONS AND WHO maintains his principal office in this State is eligible to vote for all the members of the Trial Court Commission to be elected from the Judicial Circuit in which he maintains his principal office.
10. Any eligible voter under Regulation 9 who [is not an elected governmental official or a full-time Federal, State, or municipal official or employee] MEETS THE ELIGIBILITY REQUIREMENTS OF THE EXECUTIVE ORDER ESTABLISHING NOMINATING COMMISSIONS is eligible for election to the Trial Court Commission for that Judicial Circuit in which he maintains his principal office.
11. Nominations.

Nomination for election as a member of a Trial Court Commission shall be by written petition filed with the Administrative Office. Each petition shall state the name of the nominee and the Judicial Circuit from which he seeks election. The nominee shall verify in the petition his status as a lawyer, HIS STATUS AS A REGISTERED VOTER, [his home and] HIS principal office [addresses] ADDRESS, and his intent to serve if elected. Each petition shall be signed by at least fifteen voters, other than the nominee, who are eligible to vote for the nominee. In all circuits other than the Eighth Judicial Circuit, at least three of the lawyers who sign the petition shall maintain their principal office in a county of the Judicial Circuit other than the county in which the nominee maintains his principal office. Each lawyer who signs the petition shall also verify in the petition the address and county in which his principal office is located. No lawyer may be nominated from more than one Judicial Circuit in the same election.
12. Ballots.

As soon as practicable after the close of nominations under Regulation 17, the Administrative Office shall mail or deliver the ballots and eligibility cards for a Judicial Circuit to the eligible voters in that Circuit. In all circuits other than the Eighth Judicial Circuit, ballots shall group the nominees according to the respective counties in the circuit in which the nominees maintain their principal offices. On all ballots, a block shall be printed next to the name of each nominee, to be used in voting. Ballots shall set forth the date of mailing and contain instructions to the voter consistent with Regulation 13. The eligibility card shall contain a legend and signature line for the voter to use in verification of his voter eligibility.
13. Voting.

Each voter in the Eighth Judicial Circuit, as a condition of the validity of his ballot, shall vote for six nominees. Each voter in any other circuit, as a condition of the validity of his ballot, shall cast that number of votes as the number of members remaining to be elected after the close of nominations, REDUCED BY ONE FOR EACH COUNTY IN THE CIRCUIT AS TO WHICH THERE IS NO NOMINEE. Of these votes, at least one vote shall be cast for a nominee from each county in that circuit from which there are nominees on the ballot. A voter shall indicate his choices by marking in the block next to the names of the nominees for whom he is voting. In order to be valid both (1) the voter's ballot, enclosed in a plain, sealed envelope; and (2) the eligibility card, signed by the voter, must be returned to the Administrative Office within 15 days of the date of mailing marked on the ballot. No write-in voting shall be permitted.
14. Elections - Ties.

a. In the Eighth Judicial Circuit, the six nominees who receive the

highest number of votes cast shall be elected to the Judicial Commission for that circuit.

b. In all other circuits: the nominee from each county who is either the sole nominee from that county or who receives the highest number of votes cast by the voters throughout the Judicial Circuit among all the nominees from that county shall be elected to the Judicial Commission for that Circuit as a county member, and those nominees who receive the highest number of votes cast by the voters throughout the circuit among all nominees in the circuit, excluding county members, shall be elected to any remaining member position on the Judicial Commission for that circuit.

c. In the event of a tie vote between two or more nominees, the member shall be selected from among the nominees so tied by lot, pursuant to procedures prescribed by the Administrator.

General Provisions

15. Certification - Deposit of Ballots.

The Administrator shall supervise the tabulation of the ballots and shall certify the results of each election to the Governor. The Administrator shall retain the ballots and voter eligibility cards for a period of six months from the deadline for receipt of ballots. No one shall be permitted to inspect the ballots or eligibility cards until after the election results have been certified.

16. Vacancy.

In the event of a vacancy in the position of a member of a Judicial Commission, the members of that Judicial Commission shall by majority vote fill the vacancy for the balance of the remaining term. Any lawyer so selected shall meet all eligibility requirements for the vacant position. If the vacancy occurs during the term of a member of a Trial Court Commission, the person selected to fill the vacancy shall, in addition, maintain his principal office in the county in which his predecessor maintained his principal office.

17. Closing Date for Nominations.

In elections for Judicial Commissions, the deadline for the filing of petitions of nominations is February 13, 1975.

18. Lack of Nomination.

If no valid nomination of a candidate for a lawyer membership on a Judicial Commission established by the Executive Order of December 18, 1974, has been received by the Administrative Office by the closing date established by Regulation 17, the Court of Appeals shall apoint a lawyer to fill that position. The lawyer shall possess the eligibility requirements specified for a member of that Commission. IN MAKING APPOINTMENTS UNDER THIS PARAGRAPH, THE COURT OF APPEALS SHALL ASSURE THAT EACH TRIAL COURT COMMISSION INCLUDES AT LEAST ONE LAWYER MEMBER FROM EACH COUNTY IN THE CIRCUIT, IF EACH COUNTY IN THE CIRCUIT INCLUDES AT LEAST ONE LAWYER WHO IS QUALIFIED FOR SERVICE ON THE COMMISSION AND WILLING TO ACCEPT THE APPOINTMENT.

19. Interpretation.

In all matters pertaining to the interpretation and implementation of these Regulations or the elections held pursuant to them, the determinations and decisions of the Administrator shall be final and binding; and

WHEREAS, the Court of Appeals is of the opinion that the regulations so submitted and above set forth in full, properly and appropriately fulfill the purpose and intent of the Governor's Executive Order;

NOW THEREFORE, it is this 6th day of January, 1975, ORDERED by the Court of Appeals of Maryland that, effective this date, the aforesaid regulations, quoted above, and made a part hereof, are approved by the Court of Appeals of Maryland as directions to the Administrative Office of the Courts and the

State Court Administrator, to conduct the elections for the lawyer members of the commissions directed to be created by the aforesaid Executive Order of the Governpr; and it is further

ORDERED (1) that the elections be conducted pursuant to those regulations;
(2) that the regulations be filed with the Clerk of the Court of Appeals; and
(3) that the State Court Administrator keep on file in his office copies of the regulations and make publication and distribution thereof as he may deem expedient and appropriate.

_____ JUDICIAL NOMINATING COMMISSION

CONFIDENTIAL PERSONAL DATA QUESTIONNAIRE

NOTICE TO APPLICANTS FOR JUDICIAL APPOINTMENTS

The information provided by you in this questionnaire will be held in confidence by the members of the Judicial Nominating Commission and those persons that the Commission feels it would be appropriate to consult for necessary verification. All statements made by applicants are subject to such verification by any suitable means deemed appropriate by the Commission. In the event you are nominated, a copy of the questionnaire will be forwarded to the Governor's Office.

The Commission will not forward a copy of your questionnaire to the Maryland State or any local Bar Association. Should you wish any Bar Association to receive your questionnaire, to aid it in making recommendations to the Commission, it is your responsibility to forward a copy of the questionnaire to the appropriate Bar Associations.

Should the data you provide be found inadequate or incomplete for evaluation purposes, the Commission may call upon you to provide, either in written form or by personal appearance, such additional data that may be deemed appropriate to permit a suitable evaluation of your qualifications for consideration.

You are requested to complete the information called for in this questionnaire in complete detail. Further, indicate your willingness to accept the appointment should you be favorably recommended by this Commission.

* * * * * * *

I, the undersigned, hereby submit the attached questionnaire and request that I be considered for the vacancy existing in the

_____.
(Indicate Court)

Should I be favorably considered, I will accept appointment to the court indicated.

_____ _____
Date of Application Full Name of Applicant (Signed)

_____
Full Name of Applicant (Printed)

CONFIDENTIAL PERSONAL DATA QUESTIONNAIRE

1. _____
LAST NAME FIRST MIDDLE MAIDEN

2. Give your full office address and telephone number.

3. Give your full home address, zip code, telephone number, and length of residency at this address.

4. Give the date and place of your birth.

5. If you are a naturalized citizen, please give the date and place of naturalization.

6. Indicate your marital status.

7. Indicate all colleges and law schools you have attended, including dates of attendance, degrees awarded, and any reasons for leaving a college or law school if no degree from that institution was awarded.

8. List all states and jurisdictions in which you are or ever have been admitted to practice, including the year of admission in each.

9. List all courts in which you are presently admitted to practice, including the dates of admission in each court.

10. Indicate if you are actively engaged in the practice of law, and if you are a member of a law firm, indicate your status, whether you are a partner, and give the nature and duration of your relationship with all law firms with which you have been associated.

11. Describe the general character of your present practice. Indicate the character of your typical clients and mention any legal specialties which you possess. If the nature of your practice has been substantially different at any time in the past, give the necessary details, including the character of such and the periods involved.

(a) Do you appear in court on a regular basis?

(b) Indicate what percentage of your appearances in the last five years was in the following courts:

(1) The Federal Court

(2) The State Court of Record

(3) Other Courts

(c) Approximately what percentage of litigation did you handle in the last five years which was:

(1) Civil

(2) Criminal

(3) Corporate

(4) Tax

(5) Other (Specify)

12. Indicate whether you hold or have held any public office, either appointed or elected, and whether a member of any board or commission, either currently or in the past. Give the dates and your responsibilities.

13. Have you ever held a judicial or quasi-judicial office? If so, give the court and the periods of service.

14. Please state any military service, including the highest rank obtained and dates of service as well as your form of discharge or release from service.

15. Have you ever engaged in any occupation, business, or profession other than the practice of law, and if so, give the details, including dates. This should include any employment other than that held while a student or for periods of less than 30 days.

16. Are you now or have you been during the past ten years an officer or director of any business organization or otherwise engaged in the management of any business enterprise? If so, give details, including the title of your position, the nature of your duties, and term of your service.

SPECIAL NOTE:

If any position held by you now may be in conflict with your possible appointment to the existing vacancy in the Court, would you be willing to resign from such position or give up any activities which may relate to such conflict? If your response is "no", please explain fully your reasons for believing that no conflict would exist.

xxx

17. Have you ever been charged, arrested, or held by Federal, State, or other law-enforcement authorities for violation of any Federal, State, County, or Municipal law, regulation or ordinance? Do not include traffic violations for which a fine of $25.00 or less was imposed, unless otherwise indicated.

18. Have you ever been sued by a client? If so, please give all particulars.

19. Give particulars of any other litigation in which you are now or previously have been either a plaintiff or defendant.

20. Are you now or have you ever been a subject of a Grand Jury proceeding?

If your answer is "Yes", give all particulars.

21. Have you ever been disciplined or cited for breach of ethics or unprofessional conduct or have you ever been the subject of a complaint to any court, administrative agency, bar association, disciplinary committee, or other professional group to include the Attorney Grievance Commission and the Clients' Security Trust Fund? If so, please give all particulars to include final disposition of findings.

22. What is the present state of your health, and indicate if you have been hospitalized or otherwise prevented from working due to injury or illness physical or mental, or otherwise incapacitated for a period in excess of ten days during the past ten years? Please give particulars to include the causes, the dates, and places of confinement, and the present status of the condition which caused each such confinement or incapacitation.

23. Do you presently suffer from any impairment of eyesight or hearing or other handicaps? If so, please give details and particulars.

24. Have you ever published any legal books or articles, and if so, please list them, giving the citations and dates.

25. Have you ever taught any subjects in any college or school as an instructor or professor or have you acted as a paid lecturer in any public or private institution? Please give dates and schools and all other particulars.

26. List all professional honors, prizes, awards, or other forms of recognition which you have received.

27. List all organizations, civic and fraternal, or trade groups, professional societies and similar organizations of which you are now a member or have been in the past, giving the dates of such memberships and the titles of any offices you might have held.

28. Please list all memberships in Bar Associations of any type or jurisdiction to include dates, offices, or positions held on any committee and other data you consider of particular significance.

29. Is there any information in your background which might be considered detrimental or which should be taken into consideration by the Commission in evaluating your application for consideration? If so, give all particulars to include dates and incidents.

30. Give the names and addresses of at least three individuals who are familiar with your professional qualifications, and who have known you for not less than the five immediately preceding years.

(Use additional sheets for added comments relating to the foregoing and refer to each question number.)

* * * * * *

I submit the foregoint data to the Judicial Nominating Commission and understand that it is subject to verification and authorize any person or custodian of records to release any and all information that may be available concerning me.

_____ _____

Date Signature

IN THE COURT OF APPEALS OF MARYLAND

ADMINISTRATIVE ORDER

ADOPTING RULES OF PROCEDURE FOR THE APPELLATE AND TRIAL COURTS

JUDICIAL NOMINATING COMMISSIONS

WHEREAS by Executive Order dated December 18, 1974, the Governor restructured the Appellate Judicial Nominating Commission and the several Trial Court Judicial Nominating Commissions; and

WHEREAS as a part of that Order the Governor directed that each Commission should operate under procedures specified in rules adopted by the Chief Judge of the Court of Appeals, consistent with the Executive Order;

NOW THEREFORE, I, Robert C. Murphy, Chief Judge of the Court of Appeals, do on this 1st day of March, 1975, adopt rules for governing the procedures of said Commissions, effective March 1, 1975.

1. Upon notification by the Secretary that a vacancy exists or is about to occur in a judicial office for which a Commission is to make nominations, the Chairman in consultation with the Secretary, shall establish a date for an initial Commission meeting to consider nominations for the vacancy. The Secretary shall advise Commission members of the date, place, and time of the meeting and shall notify the Maryland State Bar Association, Inc., and other appropriate bar associations of the vacancy. In addition, the Secretary, in consultation with the Chairman, shall provide for APPROPRIATE newspaper notice of the existence of the vacancy [as appropriate], AND THE CHAIRMAN OR SOME OTHER MEMBER DESIGNATED BY THE COMMISSION, SHALL ISSUE ONE OR MORE PRESS RELEASES TO ONE OR MORE NEWSPAPERS CIRCULATED WITHIN THE CIRCUIT IN WHICH THE VACANCY EXISTS. THE PRESS RELEASE SHOULD NOTE THE VACANCY, EXPLAIN THE RESPONSIBILITIES AND FUNCTIONS OF THE NOMINATING COMMISSION, AND INVITE COMMENTS BY THE PUBLIC WITH RESPECT TO CANDIDATES QUALIFIED TO FILL IT.

2. Personal data questionnaires for any applicant for appointment to the judicial vacancy shall be made available through the Chairman of the Commission or any Commission member, or by the Secretary. Every completed questionnaire shall be filed with the Secretary on or before a date specified in the public notice advising of the vacancy. The Secretary shall distribute to each Commission member a copy of every questionnaire filed with him. AN INDIVIDUAL WHO REAPPLIES TO A COMMISSION WITH WHICH HE HAS FILED A PERSONAL DATA QUESTIONNAIRE WITHIN TWELVE CALENDAR MONTHS IMMEDIATELY PRECEDING THE REAPPLICATION NEED NOT FILE A COMPLETE NEW QUESTIONNAIRE,

BUT MAY SUBMIT TO THE SECRETARY A LETTER STATING THAT HE IS REAPPLYING AND SETTING FORTH ANY CHANGES THAT HAVE OCCURRED SINCE THE SUBMISSION OF HIS QUESTIONNAIRE. THE SECRETARY SHALL DISTRIBUTE THESE LETTERS TO COMMISSION MEMBERS IN THE SAME MANNER AS QUESTIONNAIRES. Distribution shall be completed not less than three days prior to the meeting date. A COMMISSION MEETING MAY NOT BE HELD SOONER THAN SEVEN CLEAR CALENDAR DAYS FOLLOWING THE DATE SET AS THE DEADLINE FOR FILING PERSONAL DATA QUESTIONNAIRES.

3(A) Each Commission shall evaluate every person who files a questionnaire with the Secretary.

(B) A Commission may conduct [personal interviews or] any other investigation deemed necessary. EACH COMMISSION IS ENCOURAGED TO CONDUCT A PERSONAL INTERVIEW WITH EVERY CANDIDATE WHO APPLIES TO IT, AT LEAST WITH RESPECT TO THAT CANDIDATE'S INITIAL APPLICATION TO THE COMMISSION. THE INTERVIEWS MAY BE CONDUCTED BY THE FULL COMMISSION OR BY A TEAM OR COMMITTEE OF THE COMMISSION.

(C) IF A COMMISSION RECEIVES SUBSTANTIAL ADVERSE INFORMATION ABOUT A CANDIDATE, IT SHALL EITHER INFORM THE CANDIDATE OF THAT INFORMATION AND GIVE HIM AN OPPORTUNITY TO RESPOND TO IT, OR IT SHALL IGNORE THE ADVERSE INFORMATION IN ITS EVALUATION OF THE CANDIDATE.

(D) [It] THE COMMISSION shall select and nominate to the Governor the names of the persons it finds to be legally and most professionally qualified. IN DOING SO, EACH COMMISSION MEMBER SHALL VOTE ONLY FOR THOSE PERSONS HE CONSCIENTIOUSLY BELIEVES TO BE LEGALLY AND MOST FULLY PROFESSIONALLY QUALIFIED. NOT LESS THAN NINE COMMISSION MEMBERS SHALL BE PRESENT AT THE VOTING SESSION. VOTING BY PROXY OR ABSENTEE BALLOT IS NOT PERMITTED.

(E) No person's name may be submitted unless he has been found legally and most fully professionally qualified by vote of a majority of the [entire] FULL authorized membership of the commission, taken by secret ballot.

4. The Commission shall report to the Governor, in writing, the names of the persons it nominates as legally and fully professionally qualified to fill the vacancy. The names of the person shall be listed in alphabetical order. The report shall be submitted within 70 days after notification by the Commission's Secretary that a vacancy exists or is about to occur. The Commission shall release its report to the public concurrently with submission of the report to the Governor.

[4A] 5. (a) A Commission member may not attend or participate in any way in commission deliberations respecting a judicial appointment for which (1) a near relative of the commission member by blood or marriage, or (2) a law partner, associate, or employee of the commission member is a candidate.

(b) For the purpose of this rule, "a near relative by blood or marriage" includes a connection by marriage, consanguinity or affinity, within the third degree, counting down from a common ancester to the more remote.

(C) IF A COMMISSION MEMBER AND A CANDIDATE FOR NOMINATION TO JUDICIAL OFFICE HAVE A PERSONAL, BUSINESS, PROFESSIONAL, OR POLITICAL RELATIONSHIP WHICH IS SUBSTANTIAL, ALTHOUGH NOT AS CLOSE AS A RELATIONSHIP DESCRIBED IN THE PRECEDING SUBSECTIONS OF THIS RULE, THE COMMISSION MEMBER SHALL DISCLOSE THE RELATIONSHIP TO THE OTHER MEMBERS OF THE COMMISSION PRESENT AT A MEETING TO CONSIDER CANDIDATES FOR THE VACANCY. THE DISCLOSING COMMISSIONER'S FURTHER PARTICIPATION IN THAT MEETING SHALL BE DETERMINED BY VOTE OF A MAJORITY OF THE OTHER COMMISSION MEMBERS PRESENT AT THE MEETING.

[5] 6. Other rules or regulations heretofor adopted by any Judicial Selection Commission shall remain in full force and effect except to the extent inconsistent with the aforegoing regulations.